TEXAS REGISTER

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School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0827

The Honorable Robert F. Deuell, M.D.

Chair, Committee on Nominations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Taxable status of real property owned by the City of Greenville and leased to a private company (RQ-0897-GA)

S U M M A R Y

To the extent all of your questions seek a determination about the tax status of various interests in a parcel of property in the City of Greenville, they all involve fact issues that are inappropriate to the attorney general opinion process. Moreover, the initial determination about eligibility of tax exemptions rests with the chief appraiser. We thus cannot address your specific questions.

We can advise you generally with respect to the tax exemption of a leasehold interest under section 25.07, Tax Code, that a maintenance hangar intended for the safe and efficient operation of a municipal airport constitutes a public transportation facility.

Opinion No. GA-0828

Mr. Rod Bordelon

Commissioner of Workers' Compensation

Texas Department of Insurance

7551 Metro Center Drive, Suite 100

Austin, Texas 78744-1609

Re: Whether a workers' compensation carrier may pay for a prescription drug at a rate lower than the fee rate allowed under the guidelines of the Division of Workers' Compensation of the Department of Insurance (RQ-0890-GA)

S U M M A R Y

Sections 408.027, 408.028, and 413.011 of the Texas Labor Code do not establish a minimum allowable rate at which workers' compensation insurance carriers may pay for a prescription drug, medicine, or other remedy. A workers' compensation insurance carrier may contract with a workers' compensation health care network to obtain a contract with a health care provider to pay for a prescription drug, medicine, or other remedy at negotiated rates that are permitted by law.

Opinion No. GA-0829

The Honorable Florence Shapiro

Chair, Committee on Education

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the Governor must appoint an additional member to the Texas Higher Education Coordinating Board to serve from September 1, 2011 to August 31, 2013 (RQ-0896-GA)

S U M M A R Y

The Governor may appoint members to the Texas Higher Education Coordinating Board as provided by Senate Bill 286 of the 78th Legislature, Regular Session. He need not appoint an additional member to serve from September 1, 2011 to August 31, 2013.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201007105
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 14, 2010

♦ ♦ ♦

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Ethics Advisory Opinion

EAO-495. Whether a conclusion that an expense is "reimbursable with public money" for purposes of §251.001(4) and (9) of the Election Code requires that public funds be appropriated or otherwise available to cover the expense. (AOR-555)

SUMMARY

For purposes of §251.001(4) and (9) of the Election Code, the phrase "reimbursable with public money" means the governmental body has the authority to reimburse an officeholder for an expense and, at the time the expense is incurred, allows the reimbursement of the particular category of expense, such as continuing legal education. The phrase does not require the governmental body to actually reimburse the expense or to have funds available for such reimbursement at the time the expense is incurred.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201006990
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: December 9, 2010

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 28. TEXAS AGRICULTURAL FINANCE AUTHORITY

SUBCHAPTER C. AGRICULTURAL LOAN GUARANTEE PROGRAM

4 TAC §28.37

The Texas Department of Agriculture (department), on behalf of the Texas Agricultural Finance Authority (Authority), proposes new §28.37 in Title 4, Part 1, Chapter 28, Subchapter C, of the Texas Administrative Code, concerning requirements for participation in the Authority's certified lender program.

Rick Rhodes, assistant commissioner for rural economic development, has determined that for the first five years the proposed new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposal.

Mr. Rhodes has also determined that for each year of the first five years the proposed new section is in effect, the public benefit anticipated as a result of creating the proposed new section will be to promote administrative efficiency with respect to certain financial commitments issued by the Authority under its Agricultural Loan Guarantee program. There will be no additional costs to individuals, micro-businesses and small businesses as a result of the proposed new section set forth in this proposal.

Comments on the proposal may be submitted to Rick Rhodes, Assistant Commissioner for Rural Economic Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The new section is proposed under §58.052(f) of the Agriculture Code, which requires the Authority by rule to establish a certified lender program.

The code affected by the proposal is the Texas Agriculture Code, Chapter 58.

§28.37. Certified Lender Program.

(a) A lender certified under this section will receive expedited approval of loans that have a principal balance of $100,000 or less as of the date of closing the loan.

(b) A lender is eligible to participate as a certified lender under the Authority's Agricultural Loan Guarantee program if it has maintained a Master Lender Agreement in place with Authority and has had no defaults under any loans guaranteed by the Authority under its Agricultural Loan Guarantee program.

(c) A certified lender must complete and return an application for approval of each loan submitted under the Authority's certified lender program, on a form prescribed by the Department.

(d) Lender and borrower(s) must meet and adhere to all requirements for an Agricultural Loan Guarantee as set out in Subchapters A and C of this chapter (relating to Financial Assistance Rules and the Agricultural Loan Guarantee Program).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006935
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 101. GENERAL ADMINISTRATION

7 TAC §101.5, §101.6

The Texas State Securities Board proposes amendments to §101.5, concerning charges for copies of public records, and §101.6, concerning historically underutilized business (HUB) program. The amendment to §101.5 increases the certification fee from $10 to $15 and the amendment to §101.6 reflects a name change for the agency that establishes HUB rules.

Carla James, Director, Staff Services Division, and Patty Loutherback, Director, Registration Division, have determined that for the first five-year period that §101.6 is in effect there will be no foreseeable fiscal implications as a result of enforcing or administering the rule. Ms. James and Ms. Loutherback have determined that there will be fiscal implications as a result of enforcing or administering §101.5. The effect on state government for the first five-year period that the amendment to §101.5 is in effect will be an increase in revenue for each of those years of between $85 and $120.

Ms. James and Ms. Loutherback also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be that persons requesting copies will be apprised of the corresponding charges and that cross-references contained in the Board's rules will be accurate. There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with rules as proposed except for the minimal increase, described above, to be paid by persons requesting copies be certified. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Articles 581-11, 581-30, and 581-35.B(3), and Texas Government Code §2161.003.

§101.5. Charges for Copies of Public Records.

(a) (No change.)

(b) For certified copies the charge shall be $1.00 per page plus a $15.00 [~~$10.00~~] certification fee.

§101.6. Historically Underutilized Business Program.

The State Securities Board adopts by reference the rules of [~~established by~~] the Comptroller of Public Accounts [~~Texas Building and Procurement Commission~~] relating to the Historically Underutilized Business Program, contained in Title 34 [~~1~~], Part 1 [~~5~~], Chapter 20 [~~111~~], Subchapter B, of the Texas Administrative Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006982
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8303

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CHAPTER 104. PROCEDURE FOR REVIEW OF APPLICATIONS

7 TAC §104.6

The Texas State Securities Board proposes an amendment to §104.6, concerning exceeding the time periods, to conform the provision to the agency practice of granting registration authorizations instead of issuing printed permits in certain circumstances.

Patty Loutherback, Director, Registration Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the rule reflects agency practice. There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-7 and 581-10, and Texas Government Code, §2005.003.

§104.6. Exceeding the Time Periods.

(a) The Agency may exceed the time periods set forth in these sections if:

(1) the number of permits and registration authorizations exceeds by 15% or more the number processed in the same calendar quarter of the preceding year;

(2) - (4) (No change.)

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006983
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8303

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CHAPTER 107. TERMINOLOGY

7 TAC §107.2

The Texas State Securities Board proposes an amendment to §107.2, concerning definitions, to add definitions for "accredited

investor," "individual accredited investor," "institutional accredited investor," and "Form D." By providing a uniform definition for accredited investor and its related parts, it should be possible to make updates to the definition in this section rather than requiring changes be made throughout the Board's rules each time the definition is updated by SEC Rule. The major change being made to the definition of accredited investor incorporates changes made by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 ("Dodd-Frank Act"), §413(a), to adjust the net worth standard for natural persons to $1,000,000, excluding the value of the primary residence of such natural person. A definition is also being added for the "EFD System," which will be the electronic filing system used for filing Form D with state regulators.

Patty Loutherback, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be consistent use of various terms used throughout the Board's rules. There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5, 581-7, 581-12, 581-12-1, 581-13, 581-15, 581-17 through 581-19, and 581-25.

§107.2. Definitions.

The following words and terms, when used in Part 7 of this title (relating to the State Securities Board), shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (39) (No change.)

(40) Accredited investors--Persons who are either individual accredited investors or institutional accredited investors as those terms are defined in this section.

(41) Individual accredited investor--Natural person as described in Rule 501(a)(5) and (6) promulgated by the SEC under the Securities Act of 1933 as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6758 and 33-6825, and as adjusted by The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203.

(42) Institutional accredited investor--An entity described in Rule 501(a)(1)-(4), (7) and (8) promulgated by the SEC under the Securities Act of 1933 as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6758 and 33-6825.

(43) Form D--Form D, Notice of Exempt Offering of Securities, as effective on September 15, 2008 (17 Code of Federal Regulations §239.500).

(44) EFD System--The Electronic Form D system provided by the North American Securities Administrators Association (NASAA) that is used for electronic filing of Form D with the Securities Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006984
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8303

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CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

7 TAC §109.4, §109.5

The Texas State Securities Board proposes amendments to §109.4, concerning securities registration exemption for sales to financial institutions and certain institutional investors, and §109.5, concerning dealer registration exemption for sales to financial institutions and certain institutional investors, to replace the cross-reference to the portions of the SEC definition of "accredited investor" with the equivalent provisions in the new "institutional accredited investor" definition that is proposed to be added to §107.2.

Patty Loutherback, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rules are in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Loutherback and Mr. Zivley also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to utilize a uniform definition that can be easily updated to coordinate with federal law. There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Articles 581-5, 581-7, 581-12, 581-12-1, 581-18, and 581-19.

§109.4. Securities Registration Exemption for Sales to Financial Institutions and Certain Institutional Investors.

(a) (No change.)

(b) Sales to certain institutional investors. The State Securities Board, pursuant to the Act, §5.T, exempts from the securities registration requirements of the Act, §7, the offer and sale of any securities to any of the following persons:

(1) an "institutional accredited investor," [~~(~~] as that term is defined in §107.2 of this title (relating to Definitions) [~~Rule 501(a)(1)-(4), (7), and (8) promulgated by the Securities and Exchange Commission (SEC) under the Securities Act of 1933, as amended (1933 Act), as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825)~~], excluding, however, any self-directed employee benefit plan with investment decisions made solely by persons that are "individual accredited investors" as defined in §107.2 of this title [~~Rule 501(a)(5)-(6)~~];

(2) - (3) (No change.)

(c) (No change.)

§109.5. Dealer Registration Exemption for Sales to Financial Institutions and Certain Institutional Investors.

(a) (No change.)

(b) Sales to certain institutional investors. The State Securities Board, pursuant to the Act, §5.T and §12.C, exempts a person from the dealer and agent registration requirements of the Act, when the person sells or offers for sale any securities to any of the following persons:

(1) an "institutional accredited investor," [~~(~~] as that term is defined in §107.2 of this title (relating to Definitions) [~~Rule 501(a)(1)-(4), (7), and (8) promulgated by the Securities and Exchange Commission (SEC) under the Securities Act of 1933, as amended (1933 Act), as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825)~~], excluding, however, any self-directed employee benefit plan with investment decisions made solely by persons that are "individual accredited investors" as defined in §107.2 of this title [~~Rule 501(a)(5)-(6)~~];

(2) - (3) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006985

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8303

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7 TAC §109.13

The Texas State Securities Board proposes an amendment to §109.13, concerning limited offering exemptions. The Texas Uniform Limited Offering Exemption ("ULOE") in subsection (k) would be updated to use the definitions of "accredited investor" and "Form D" that are proposed to be added to §107.2; eliminate the filing of a separate consent to service as the new Form D includes a consent to service within the form; and mandate the use of the EFD System for electronic filing when it becomes available. Additionally, the Intrastate Limited Offering Exemption ("ILOE") would be changed to replace the unique definition of "accredited investor" with the uniform definition for "accredited investor" used in SEC Regulation D offerings and proposed in §107.2.

Patty Loutherback, Director, Registration Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to avoid confusion by using a uniform definition for "accredited investor." There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Articles 581-5.T and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5, 581-7, and 581-12.

§109.13. Limited Offering Exemptions.

(a) - (j) (No change.)

(k) Uniform limited offering exemption. In addition to sales made under the Texas Securities Act, §5.I, the State Securities Board, pursuant to the Act, §5.T, exempts from the registration requirements of the Act, §7, any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.505 and/or 230.506, including any offer or sale made exempt by application of Rule 508(a), as made effective in United States Securities and Exchange Commission Release Number 33-6389 and as amended in Re-

lease Numbers 33-6437, 33-6663, 33-6758, [and] 33-6825, 33-6863, 33-6902, 33-6949, 33-6996, 33-7470, 33-8876, and 33-8891 and as adjusted by The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, and which satisfies the following further conditions and limitations.

(1) - (4) (No change.)

(5) The issuer shall file with the Securities Commissioner a notice on Form D [as made effective in United States Securities and Exchange Commission Release Number 33-6663 (17 Code of Federal Regulations §239.500)].

(A) - (B) (No change.)

[(C) Unless otherwise available, included with or in the initial notice shall be a consent to service of process.]

(C) [(D)] Every person filing the initial notice on Form D shall pay a filing fee of 1/10 of 1.0% of the aggregate amount of securities described as being offered for sale, but in no case more than $500.

(D) The filing of Form D and the payment of the filing fee must be made electronically through the EFD System, when such system becomes available.

(6) - (17) (No change.)

(l) Intrastate limited offering exemption. In addition to sales made under the Texas Securities Act, §5.I, the State Securities Board, pursuant to the Act, §5.T, exempts from the registration requirements of the Act, §7, any offer or sale of any securities by the issuer itself, or by a registered dealer acting as agent for the issuer provided all offers and sales are made pursuant to an offering made and completed solely within this state and all the conditions in paragraphs (1)-(11) of this subsection are satisfied.

(1) The sale is made, without the use of any public solicitation or advertisements, as set forth in subsection (a) and subsection (b) of this section to:

(A) (No change.)

(B) other well-informed investors who are "accredited investors" as defined in §107.2 of this title (relating to Definitions) [paragraph (11) of this subsection]. (For purposes of this subsection, the term "well informed" shall have the same meaning as set out in subsection (a)(1) of this section, and the term "5.I" in such subsection shall include sales made pursuant to this subsection.)

(2) - (5) (No change.)

(6) The offering complies with subsections (a)-(d) and (j) of this section. However, persons who are "accredited investors" as defined in §107.2 of this title [paragraph (11) of this subsection] are deemed to be "sophisticated" as defined in subsection (a)(2) of this section.

(7) - (8) (No change.)

(9) Notice filing requirements.

(A) An issuer who is not a registered securities dealer and who does not sell securities by or through a registered securities dealer shall file a sworn notice on Form 133.29 not less than 10 business days before any sale claimed to be exempt under this subsection may be consummated for [For] sales under paragraph [subparagraph] (1)(B) of this subsection, in whole or in part to individual accredited investors, as defined in §107.2 of this title [listed in paragraph (11)(E)-(H) of this subsection of such definition of accredited investor issuers who are not registered securities dealers and who do not sell securities by or through registered securities dealers shall file a sworn notice on Form 133.29 or a reproduction thereof not less than 10 business days before any sale claimed to be exempt under this subsection may be consummated].

(B) For the purpose of filing Form 133.29, "business days" means ordinary business days and does not include Saturdays, Sundays, or state holidays.

(C) No [However, no] notice is required for sales made under paragraph (1)(A) of this subsection or under paragraph (1)(B) of this subsection where the sales are made exclusively to institutional accredited investors as defined in §107.2 of this title [paragraph (11)(A)-(D) of this subsection or to entities in which all of the equity owners are accredited investors listed in paragraph (11)(A)-(D) of this subsection of such definition].

(D) The issuer may be required by the Securities Commissioner to give details concerning any information requested in Form 133.29 and may be required to furnish any additional information deemed necessary by the Securities Commissioner to determine the issuer's business repute and qualifications.

(E) [(B)] Every issuer filing a notice on Form 133.29 shall pay a filing fee of 1/10 of 1.0% of the aggregate amount of securities described as being offered for sale, but in no case more than $500.

(10) (No change.)

(11) "Accredited investor" is defined in §107.2 of this title and for [For] purposes of this subsection, includes [accredited investor shall mean] any person [who comes within any of the following categories, or] who the issuer reasonably believes comes within that definition [any of the following categories,] at the time of the sale of the securities to that person. [:]

[(A) any bank as defined in the Securities Act of 1933, §3(a)(2), whether acting in its individual or fiduciary capacity; insurance company as defined in the Securities Act of 1933, §2(13); investment company registered under the Investment Company Act of 1940 or a business development company as defined in that Act, §2(a)(48); small business investment company licensed by the U.S. Small Business Administration under the Small Business Investment Act of 1958, §301(c) or (d); employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, Title I, if the investment decision is made by a plan fiduciary, as defined in such Act, §3(21), which is either a bank, insurance company, or investment adviser registered under the Investment Advisers Act of 1940, or if the employee benefit plan has total assets in excess of $5 million;]

[(B) any private business development company as defined in the Investment Advisers Act of 1940, §202(a)(22);]

[(C) any organization described in the Internal Revenue Code, §501(c)(3), with total assets in excess of $5 million;]

[(D) any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;]

[(E) any person who purchases at least $150,000 of the securities being offered, where the purchaser's total purchase price does not exceed 20% of the purchaser's net worth at the time of sale, or joint net worth with that person's spouse, for one or any combination of the following:]

[(i) cash;]

[(ii) securities for which market quotations are readily available;]

~~*[(iii)* any unconditional obligation to pay cash or securities for which market quotations are readily available which obligation is to be discharged within five years of the sale of securities to the purchaser; or]~~

~~*[(iv)* the cancellation of any indebtedness owed by the issuer to the purchaser;]~~

~~[(F) any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1 million;]~~

~~[(G) any natural person who had an individual income or joint income with that person's spouse in excess of $200,000 in each of the two most recent years and who reasonably expects an income in excess of $200,000 in the current year; and]~~

~~[(H) any entity in which all of the equity owners are accredited investors under subparagraphs (A)-(D), (F), or (G) of this paragraph.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006986
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8303

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CHAPTER 114. FEDERAL COVERED SECURITIES

7 TAC §114.4

The Texas State Securities Board proposes an amendment to §114.4, concerning filings and fees, to update the Texas filing requirements for federal covered securities that are issued pursuant to Securities and Exchange Commission ("SEC") Regulation D, Rule 506. The proposal eliminates the filing of a separate consent to service as the new Form D includes a consent to service within the form and mandates the use of the EFD system for filing and payment of fees when that system becomes available.

Patty Loutherback, Director, Registration Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to eliminate filing of an unnecessary form and provide for use of a streamlined notice filing process for Rule 506 filings that coordinates with the federal filing requirements for these offerings. There will be no adverse economic effect on small businesses or micro-businesses. There is an anticipated economic cost to persons who are required to comply with the rule as proposed because there will be a yet-to-be-specified filing fee to be set and imposed by the North American Securities Administrators Association (NASAA) when the EFD system becomes available. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Article 581-5.T and Article 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5, 581-7, and 581-8.

§114.4. Filings and Fees.

(a) (No change.)

(b) Special circumstances.

(1) SEC Regulation D, Rule 506 offerings. In connection with an offering described in both §109.13(k)(16) of this title (relating to Limited Offering Exemptions) and SEC Regulation D, Rule 506, at the time the Form D is filed with the SEC, but no later than 15 days after the first sale of the federal covered securities in this state, the issuer shall provide to the Securities Commissioner:

(A) a notice on Form D; and

~~[(B) a consent to service of process signed by the issuer, if required by §114.3 of this title (relating to Consents to Service of Process), if, previously, such a consent to service has not been filed with the Securities Commissioner; and]~~

(B) ~~[(C)]~~ a fee of one-tenth of 1.0% of the aggregate amount of federal covered securities described as being offered for sale, but in no case more than $500, as provided in the Texas Securities Act, §35.B(7).

(C) The filing of Form D and the payment of the filing fee shall be made electronically through the EFD System, when such system becomes available.

(2) - (4) (No change.)

(c) (No change.)

(d) Excess sales.

(1) (No change.)

(2) An offeror in an SEC Regulation D, Rule 506 offering, who paid less than the maximum fee prescribed in subsection (b)(1) of this section and offered a greater amount of federal covered securities than authorized may do the following:

(A) - (B) (No change.)

(C) The filing of Form D and the payment of the filing fee shall be made electronically through the EFD System, when such system becomes available.

(3) (No change.)

(e) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §§116.2, 116.9, 116.11, 116.12

The Texas State Securities Board proposes amendments to §116.2, concerning application requirements; §116.9, concerning post-registration reporting requirements; §116.11, concerning disclosure requirement/brochure rule; and §116.12, concerning advisory contract requirements.

The changes to §116.2 would update the Form ADV filing requirements following recent amendments to the form by the SEC and identify the portions of the application that are filed electronically through the Investment Adviser Registration Depository (IARD). As recently revised, Form ADV contains four parts: Parts 1A, 1B, 2A and 2B. Part 1 (A and B) of Form ADV provides regulators with information to process registrations and to manage their regulatory and examination programs. Part 2A contains the requirements for the disclosure "brochure" that advisers must provide to prospective clients initially and to existing clients annually, and Part 2B contains information about the advisory personnel providing clients with investment advice. Prior to the recent amendments, Part 2 was designated as "Part II." The proposal also clarifies which application items must be filed electronically through IARD and which are to be filed in paper form with the Commissioner.

The changes to §116.9 would add subsection (d) that requires a currently registered investment adviser to file the new narrative Part 2 of Form ADV annually within 90 days after the end of the investment adviser's fiscal year.

The changes to §116.11 would update references to portions of Form ADV to reflect the relocation or renaming of those provisions in the newly revised form.

The changes to §116.12 would update references to portions of Form ADV to reflect the relocation or renaming of those provisions in the newly revised form.

Patty Loutherback, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rules are in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Loutherback and Mr. Zivley also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be that prospective clients and existing clients of investment advisers will receive enhanced disclosures, which the registered investment adviser can file electronically using a uniform form.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES

The Agency has approximately 5,255 investment adviser firms registered or notice filed. Of the 1,331 registered advisers, approximately 99% are small businesses and approximately 95% are micro-businesses.

The Agency estimates that the projected economic impact of the proposed amendment to Rule 116.2 updating the Form ADV filing requirements to include Part 2 and identifying portions of the application that are to be filed electronically through the IARD will be the yet-to-be-specified filing fee to be imposed on users by the IARD. However, all investment advisers--whether registered with Texas or with other states--will incur this filing fee pursuant to the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and ensuing SEC regulations regardless of this proposed amendment to Rule 116.2. Therefore, the costs of this rule amendment to small or micro-investment advisers are neutral.

In addition, the Agency estimates that the projected economic impact of the proposed amendment to Rule 116.9 requiring currently registered investment advisers to file the new narrative Part 2 of Form ADV annually within 90 days after the end of the investment adviser's fiscal year will be the increased time and costs that may be incurred in the initial preparation of the new Part 2, including estimated costs of $5,000 or less for possible software or consulting fees. The initial preparation of the new Part 2 is estimated by the SEC to cost the investment advisers it regulates an average of $4,700 per adviser if the adviser retains outside legal services and compliance consulting services, or $2,700 per adviser if such services are not retained. The costs will be much less for small or micro-businesses whose business models generally are less complex and generally require fewer disclosures than larger investment advisers.

A free template or form for the new Part 2 is available on the NASAA website. Several software programs, available for less than $500, will convert the current Q&A-formatted Part II of the Form ADV to the new narrative Part 2.

In addition, some investment advisers who are registered in Texas are also registered in other states that will require filing the new Part 2. Those investment advisers will incur the time and costs for preparing the new Part 2 regardless of this rule amendment, thereby reducing its economic impact.

After the initial preparation of the new Part 2, the costs to investment advisers to comply with this rule amendment should be neutral as the time, costs and fees should be similar to those previously incurred for updating the old Part II of Form ADV or otherwise complying with Rule 116.9 reporting requirements.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the rule amendment. One, the Agency considered exempting small or micro-investment advisers, but determined the investing public would benefit from the transparency and disclosure of critically important information provided for in the new narrative Part 2. Two, the Agency considered implementing different requirements for small or micro-investment advisers, but decided it would be more helpful for investors to compare and contrast adviser services if all investment advisers, whether large or small, were required to

provide disclosures using the same format. Finally, the Agency considered not adopting the proposed rule amendment, but decided instead that varying from the uniform standards resulting from the Dodd-Frank Act, from SEC regulations, and from similar rules being adopted by the majority of other states would not be consistent with the health, safety and economic welfare of the state. Diverging from uniform standards also could ultimately result in higher compliance costs for investment advisers registered in more than one state.

Ms. Loutherback also has determined that, except for the costs discussed above, there are no additional anticipated economic costs to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Articles 581-12, 581-13, 581-15, 581-18, 581-19.

§116.2. Application Requirements.

(a) Investment adviser and investment adviser representative application requirements. A complete application consists of the following:

(1) items filed electronically via the Investment Adviser Registration Depository (IARD), which is jointly operated by the North American Securities Administrators Association, Inc. (NASAA), the Securities and Exchange Commission (SEC), and Financial Industry Regulatory Authority (FINRA) using the applicable uniform forms: [and must be filed in paper form with the Securities Commissioner, except in such time as the Investment Adviser Registration Depository System (IARD) becomes available:]

(A) [(1)] Form ADV;

(B) [(2)] Form U-4 for the designated officer and a Form U-4 for each investment adviser representative or solicitor to be registered;

(C) disclosure document or Part 2 of Form ADV; and

(D) the appropriate registration fee(s).

(2) items filed in paper form with the Securities Commissioner:

(A) [(3)] a copy of articles of incorporation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the jurisdiction or by an officer or partner of the applicant;

(B) [(4)] a balance sheet prepared in accordance with generally accepted accounting practices reflecting the financial condition of the investment adviser as of a date not more than 90 days prior to the date of such filing. The balance sheet should be prepared by independent certified public accountants or independent public accountants, or must instead be attested by the sworn notarized statement of the applicant's principal financial officer. If attested by the principal financial officer of the applicant, such officer shall certify as follows: I am the principal financial officer of (name of investment adviser). The accompanying balance sheet has been prepared under my direction and control and presents fairly its financial position on the dates indicated to the best of my knowledge, belief, and ability. (Signature and Title).

[(5) disclosure document or Part II of Form ADV;]

(C) [(6)] a copy of the investment adviser's standard advisory contract;

(D) [(7)] fee schedule; and

(E) [(8)] any other information deemed necessary by the Securities Commissioner to determine an investment adviser's financial responsibility or an investment adviser's or investment adviser representative's business repute or qualification. [; and]

[(9) the appropriate registration fee(s).]

(b) - (d) (No change.)

(e) Investment Adviser Registration Depository (IARD).

[(1) Whenever the Texas Securities Act or Board rules require the filing of an application with the Securities Commissioner for investment adviser or investment adviser representative registration, such application must be filed electronically via the IARD, which is jointly operated by FINRA, the North American Securities Administrators Association, Inc. (NASAA), and the Securities and Exchange Commission (SEC). Applicants shall use the applicable uniform forms for the submission of the filing in question and shall supplement their electronic filing by filing, in paper form, the items listed in paragraphs (3)-(9) of subsection (a) of this section, directly with the Commissioner.]

[(2)] Uniform forms submitted through the IARD that designate Texas as a jurisdiction in which the filing is to be made are deemed to be filed with the Securities Commissioner and constitute official records of the Board.

[(f) Use of IARD.]

[(1) All investment advisers seeking registration with the Securities Commissioner must file Part I of Form ADV and the filing fee via the IARD.]

[(2) All persons seeking registration as an investment adviser representative must file the Form U-4 and the appropriate fee via the CRD.]

§116.9. Post-Registration Reporting Requirements.

(a) - (c) (No change.)

(d) Each person registered as an investment adviser shall update the Form ADV Part 2 or disclosure document as part of any amendment or annual updating amendment. For purposes of this subsection, "annual updating amendment" means an amendment to an investment adviser's Form ADV filed within 90 days after an investment adviser's fiscal year end that is used to update the responses to any other item for which the information is no longer accurate.

§116.11. Disclosure Requirement/Brochure Rule.

All registered investment advisers must deliver to all clients or prospective clients a written disclosure statement that may be:

(1) either Part 2 [II] of Form ADV, Uniform Application for Investment Adviser Registration, or another disclosure statement which contains at least the information disclosed on Part 2 [II] of Form ADV as effective on October 12, 2010 (17 Code of Federal Regulations

§279.1) [as made effective in Release Number IA-991 and corrected in Release Number IA-991A]; or

(2) a disclosure statement containing at least the information required by Part 2A Appendix 1 [Schedule H] of Form ADV, Uniform Application for Investment Adviser Registration, if the investment adviser is the sponsor, or the sponsor and the portfolio manager, of a wrap fee program that the client will enter into.

(3) (No change.)

(4) On an annual basis, the Part 2 [H] of Form ADV or other disclosure statement satisfying the requirements of paragraph (1) or (2) of this section must be provided to all customers, or in the alternative, the investment adviser must offer the client the right to receive such Part 2 [H] of Form ADV or other disclosure statement.

§116.12. Advisory Contract Requirements.

(a) The advisory contract must contain the following language: "Client acknowledges receipt of Part 2 [H] of Form ADV; a disclosure statement containing the equivalent information; or a disclosure statement containing at least the information required by Part 2A Appendix 1 [Schedule H] of Form ADV, if the client is entering into a wrap fee program sponsored by the investment adviser. If the appropriate disclosure statement was not delivered to the client at least 48 hours prior to the client entering into any written or oral advisory contract with this investment adviser, then the client has the right to terminate the contract without penalty within five business days after entering into the contract. For the purposes of this provision, a contract is considered entered into when all parties to the contract have signed the contract, or, in the case of an oral contract, otherwise signified their acceptance, any other provisions of this contract notwithstanding."

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.16, §139.19

The Texas State Securities Board proposes amendments to §139.16, concerning sales to individual accredited investors, and §139.19, concerning accredited investor exemption, to add a cross-reference to the individual accredited investor definition that is proposed to be added to §107.2 in lieu of restating the relevant portions of the federal rule.

Patty Loutherback, Director, Registration Division, has determined that for the first five-year period the rules are in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Loutherback has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to avoid confusion by referencing a uniform definition for "individual accredited investor." There will be no adverse economic effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendments are proposed under Texas Civil Statutes, Article 581-5.T and Article 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposals affect Texas Civil Statutes, Article 581-7.

§139.16. Sales to Individual Accredited Investors.

(a) (No change.)

(b) Who may purchase; who constitutes the issuer for purposes of selling securities.

(1) Individual accredited investors. The [For purposes of this section, the] term "individual accredited investor" is defined in §107.2 of this title (relating to Definitions) [shall mean any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his or her purchase exceeds $1 million or any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year]. For purposes of this section, the [The] term "individual accredited investor" [shall] also includes [include] any self-directed employee benefit plan with investment decisions made solely by persons that are "individual accredited investors" as defined in §107.2 of this title [this paragraph] and the individual retirement account of any such individual accredited investor.

(2) (No change.)

(c) - (k) (No change.)

§139.19. Accredited Investor Exemption.

Any offer or sale of a security by an issuer in a transaction that meets the requirements of this section is exempted from the securities registration requirements of the Texas Securities Act and exempted from the filing requirements contained in the Texas Securities Act, §22.A, and Chapter 139 of this title (relating to Guidelines for Regulation of Offers).

(1) Who may purchase. Sales of securities shall be made only to persons who are or the issuer reasonably believes are accredited investors. "Accredited investor" is defined in §107.2 of this title (relating to Definitions) [17 Code of Federal Regulations §230.501(a) promulgated by the SEC as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6758 and 33-6825].

(2) - (10) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 307. PROCEEDINGS BEFORE THE COMMISSION

SUBCHAPTER C. PROCEEDINGS BY STEWARDS AND RACING JUDGES

16 TAC §307.62

The Texas Racing Commission (Commission) proposes an amendment to 16 TAC §307.62, concerning disciplinary hearings. The section provides the procedural framework for the conduct of hearings by racing stewards and judges. The proposed amendment will clarify the standards of evidence and of proof that will be applied in disciplinary hearings, as well as set out the standards for granting continuances.

Chuck Trout, Interim Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to clarify and strengthen the procedural framework for disciplinary hearings. The proposed amendment will also bring the Commission's rules more closely into alignment with the national model rules.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §3.07, which authorizes the Commission to make rules specifying the authority and duties of stewards and judges.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§307.62. Disciplinary Hearings.

(a) - (c) (No change.)

(d) Evidence.

(1) - (3) (No change.)

(4) The stewards and racing judges shall allow a full presentation of evidence and are not bound by the technical rules of evidence. However, the stewards and racing judges may disallow evidence that is irrelevant or unduly repetitive of other evidence. The stewards shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The stewards and racing judges may admit hearsay evidence if the stewards and racing judges determine the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by state law apply in hearings before the stewards and racing judges. Hearsay evidence that is not otherwise admissible under the exceptions of the Texas Rules of Evidence is an insufficient basis alone for a ruling.

(e) Burden of Proof. The burden of proof is on the person bringing the complaint to show, by a preponderance of the evidence, that the licensee has violated or is responsible for a violation of the Act or a Commission rule.

(f) Continuances.

(1) Upon receipt of a notice, a person may request a continuance of the hearing.

(2) For good cause shown, the stewards or racing judges may grant a continuance of any hearing for a reasonable period of time.

(3) The stewards or racing judges may at any time order a continuance on their own motion.

(g) [~~(e)~~] Agreed Settlement. The person who is the subject of the disciplinary hearing may waive the right to a hearing and subsequent appeal and enter into an agreed settlement with the stewards or racing judges.

(h) [~~(f)~~] Failure to Appear. The stewards or racing judges may suspend the license of a person who fails to appear at a disciplinary hearing after receiving written notice of the hearing until the matter is adjudicated.

(i) [~~(g)~~] Summary Suspension. If the stewards or racing judges determine that a licensee's actions constitute an immediate danger to the public health, safety, or welfare, the stewards or racing judges may enter a ruling summarily suspending the license, without a prior hearing. A summary suspension takes effect immediately on issuance of the ruling. If the stewards or racing judges suspend a license under this subsection, the licensee is entitled to a hearing on the suspension not later than three calendar days after the day the license is suspended. The licensee may waive his or her right to a hearing on the summary suspension within the three-day period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201007015
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

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CHAPTER 321. PARI-MUTUEL WAGERING

The Texas Racing Commission (Commission) proposes amendments to 16 TAC §§321.15, 321.23, 321.211, 321.312, 321.313, 321.417, 321.503, and 321.605. The Commission also proposes new §§321.12, 321.46, 321.319, 321.320, and 321.321. The amendments and new rules are proposed in conjunction with the Commission's rule review of Chapter 321 pursuant to Texas Government Code §2001.039. Notice of this rule review was published in the January 1, 2010, issue of the *Texas Register* (35 TexReg 113).

The sections proposed for amendment relate to: pari-mutuel wagering, including totalisator licenses, wagering information, and results; live wagering, including carryover pools, pick (n) pools, select four pools, and select five pools; simulcast wagering, including emergency procedures and purses; and electronic pari-mutuel wagering within the enclosure of racetracks. The new sections relate to: synchronizing the time between the totalisator systems, video output and security systems; payment on tickets that a self-serve terminal failed to issue due to mechanical failure; and new pari-mutuel pools, including select three pools, super hi-five pools, and fortune pick (n) pools.

Chuck Trout, Interim Executive Director, has determined that for the first five year period the new rules and amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing the amendments.

Mr. Trout has determined that the new rules and amendments will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed new rules and amendments.

Mr. Trout has determined that for each year of the first five years the new and amended rules are in effect the following statements regarding the anticipated public benefit will apply:

Proposed new §321.12 improves the ability of the Commission, the totalisator companies, and the associations to audit wagering irregularities by synchronizing the time between the totalisator system, the video output, and the security systems.

The change to §321.15 will clarify the type of license that a totalisator company must obtain in order to provide totalisator services to a racetrack in Texas.

The change to §321.23 clarifies and further defines the language for the locations that an association shall use to post the required information. The change also adds an expiration date to vouchers to conform to the statutory changes adopted in House Bill 2701 by the 80th Legislature.

Proposed new §321.46 establishes the procedures to follow when there is a ticket jam or paper outage on a self-serve terminal.

The change to §321.211 provides clear direction to the associations regarding the type of account to deposit the money in a carryover pool when the money is required to be escrowed.

The change to §321.312 provides clear direction to the associations regarding the type of account to deposit the money in a carryover pool when the money is required to be escrowed. The change also provides direction regarding distribution of a pick (n) pool if a turf race must be relocated to another racing surface.

The change to §321.313 eliminates the select three pool from this section so that it may be addressed separately in proposed new §321.319.

Proposed new §321.319 is a select three pool with a consolation payout when there is a scratch after the first race has run in the select three pool.

Proposed new §321.320 is a new wagering pool that requires the bettor to select the five animals that will finish first, second, third, fourth, and fifth in one race.

Proposed new §321.321 is a new wagering pool similar to a pick (n) in that it requires the bettor to pick the winner of number (n) consecutive races, but differs in that it requires a single unique winning ticket and the wager must be made in the minimum amount. For, example, an association could create a Fortune Pick (7) for a $1.00 minimum wager. In this pool, the winner claims the entire pool if he or she holds the only minimum wager winning ticket for the winners in all races comprising the Fortune Pick (7). If more than one bettor selects all the winners in all the races comprising the Fortune Pick (7), then the winning bettors will share 25% of the pool and the remaining 75% will be carried over the next performance.

The change to §321.417 provides an association with additional time to resolve video signal issues. Currently, if the issues have not been resolved within 30 minutes, the association must stop wagering on the host racetrack's races unless it takes additional steps to provide information to the patrons and protect the integrity of racing.

The change to §321.503 gives an association the ability to increase the amount of purse money allocated to the purse account from the sale of the racetrack's signal.

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

SUBCHAPTER A. MUTUEL OPERATIONS
DIVISION 1. GENERAL PROVISIONS

16 TAC §321.12, §321.15

The new rule and amendment are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The new rule and rule amendment implement Texas Revised Civil Statutes Annotated, Article 179e.

§321.12. Time Synchronization.

(a) Display and verification of the accurate off time and start of a race is critical. To ensure accurate verification of off time with the close of betting on all races, the association shall ensure:

(1) Tote times shall be synchronized to an atomic clock on a start-of-day basis.

(2) Source video signal shall be synchronized with the atomic clock.

(3) The time of day shall be displayed at the start of the race in the HR:MN:SC format.

(b) Security system video, which monitors mutuel lines, shall be synchronized with the atomic clock.

§321.15. License to Provide Totalisator Services.

(a) To provide totalisator services to an association in Texas, a totalisator company must be licensed by the Commission as a Totalisator Vendor [~~vendor~~]. The license application must include:

(1) a copy of a current written contract to provide a totalisator system to an association;

(2) a list of all totalisator personnel assigned to work in Texas, or on behalf of an association operating in Texas, as described in §321.123 of this title (relating to Personnel Requirements);

(3) an affidavit stating that the totalisator company and its employees will comply with the Rules and the Comptroller's rules regarding totalisator operations; and.

(4) information of sufficient detail for the Commission to determine that the totalisator company is in compliance with Subchapter B of this chapter.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007017
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

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DIVISION 2. WAGERING INFORMATION AND RESULTS

16 TAC §321.23

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.23. Wagering Explanations.

(a) An association shall include the following information in the official live programs and simulcast programs and post in [~~conspicuous~~] places easily viewed by patrons and licensees on association grounds:

(1) - (2) (No change.)

(3) the expiration date of mutuel tickets and vouchers.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

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Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

♦ ♦ ♦

DIVISION 3. MUTUEL TICKETS AND VOUCHERS

16 TAC §321.46

The new rule is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed new rule implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.46. Payment on No Ticket Issue.

When a ticket issuing machine does not produce a paper ticket due to a mechanical failure, the mutuel manager may validate the wager through totalisator logs. If the transaction is a winning wager and the mutuel manager pays the patron, then the mutuel manager shall report the transaction to the Commission on a form prescribed by the Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

♦ ♦ ♦

SUBCHAPTER C. REGULATION OF LIVE WAGERING

DIVISION 1. GENERAL PROVISIONS

16 TAC §321.211

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.211. Carryover Pools.

(a) - (e) (No change.)

(f) If the last performance is canceled, [~~the association shall place~~] the pool shall be deposited in an interest-bearing account approved by the executive secretary. The [~~in escrow and the~~] pool and all accrued interest shall then be carried over and included with the appropriate pool at the next succeeding performance as an additional amount to be distributed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

♦ ♦ ♦

DIVISION 2. DISTRIBUTION OF PARI-MUTUEL POOLS

16 TAC §§321.312, 321.313, 321.319 - 321.321

The new rules and amendments are proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The proposed new rules and amendments implement Texas Revised Civil Statutes, Article 179e.

§321.312. Pick (n) [~~(N)~~].

(a) - (m) (No change.)

(n) When the condition of the turf course warrants a change of racing surface in any of the races open to pick (n) wagering, and such change has not been made known to the betting public prior to the close of wagering for the first pick (n) race, the Stewards shall declare the changed races a "no contest" for pick (n) wagering purposes and the pool shall be distributed in accordance with subsection (m) of this section. Following the designation of a race as a "no contest", no tickets shall be sold selecting a horse in such "no contest" race.

(o) [~~(n)~~] If on the last performance of the race meeting or on a designated mandatory payout performance the major pool is not distributable under subsection (h) of this section, the major pool and all money carried forward into that pool from previous performances shall be combined with the minor pool and distributed to the holders of tickets correctly designating the most, but not all, of the races comprising the pick (n) for that performance.

(p) [~~(o)~~] If the final or designated mandatory payoff performance is canceled or the major pool has not been distributed, the major pool shall be deposited in an interest-bearing account approved by the executive secretary. The [~~escrowed by the association and the~~] major pool plus all accrued interest shall then be carried over and included in a major pool offered on one of the first five days of the next subsequent race meeting or on the next performance after the undistributed mandatory payout performance, as approved by the executive secretary.

(q) [~~(p)~~] Except for refunds required by this section, a pick (n) ticket may not be sold, exchanged, or canceled after the close of wagering on the first of the pick (n) races.

(r) [~~(q)~~] A person may not disclose the number of tickets sold in the pick (n) pool or the number or amount of tickets selecting winners of the races comprising the pick (n) until the results of the last race comprising the pick (n) are official. The totalisator equipment shall be programmed or constructed to suppress the publication or printing of any such information, except the total number of dollars wagered in the pick (n), until the results of the last race comprising the pick (n) are official.

§321.313. Select [~~Three,~~] Four[,] or Five.

(a) The select [~~three,~~] four[,] or five wager is not a parlay and has no connection with or relation to the win, place, and show pools shown on the tote board.

(b) A select [~~three,~~] four[,] or five ticket is evidence of a binding contract between the holder of the ticket and the association and the ticket constitutes an acceptance of this section. The association may select a distinctive name for the select [~~three,~~] four[,] or five, with the prior approval of the executive secretary.

(c) The select [~~three,~~] four[,] or five pari-mutuel pool consists of amounts contributed for a selection to win only on each of [~~three,~~] four[,] or five races designated by the association with the approval of the executive secretary. Each person purchasing a select [~~three,~~] four[,] or five ticket shall designate the winning animal in each of the races comprising the select [~~three,~~] four[,] or five.

(d) A coupled entry or mutuel field in a race that is part of the select [~~three,~~] four[,] or five shall race as a single betting interest for the purpose of the select [~~three,~~] four[,] or five pari-mutuel pool calculations and payoffs to the public. If any part of a coupled entry or mutuel field is a starter in a race, the entry or field selection remains as the designated selection to win in that race for the select [~~three,~~] four[,] or five calculation, and the selection may not be deemed a scratch.

(e) The select [~~three,~~] four[,] or five pari-mutuel pool may be a carryover pool or a non-carryover pool. The association, with prior approval of the executive secretary, will decide if the select [~~three,~~] four[,] or five pari-mutuel pool will be offered as a carryover pool or a non-carryover pool.

(f) A non-carryover select [~~three,~~] four[,] or five pari-mutuel pool shall be distributed in accordance with this subsection. One hundred percent of the net amount in the pari-mutuel pool subject to distribution among winning ticket holders shall be distributed among the holders of pari-mutuel tickets which:

(1) Correctly designate the official winner in each of the races comprising the select [~~three,~~] four[,] or five.

(2) If no pari-mutuel ticket is sold combining the winners of all of the races comprising the select [~~three,~~] four[,] or five, 100% of the net amount in the pari-mutuel pool shall be distributed among the holders of pari-mutuel tickets which include the winners of the next

highest number of winners of the races in the select [~~three,~~] four[,] or five.

(3) If no pari-mutuel ticket is sold that would require distribution of the select [~~three,~~] four[,] or five pool under paragraphs (1) or (2) of this subsection, the association shall carry over all money wagered in the select [~~three,~~] four[,] or five pool to the next consecutive select [~~three,~~] four[,] or five pool.

(4) If the final day of a race meeting is canceled or the select [~~three,~~] four[,] or five pool has not been distributed, the pool shall be deposited in an interest-bearing account approved by the executive secretary. The [~~escrowed by the association, and the~~] pool plus all accrued interest shall then be carried over and added to the select [~~three,~~] four[,] or five pari-mutuel pool in the following race meeting on a date and performance designated by the executive secretary.

(5) If [~~one or two of the races comprising a select three is canceled,~~] two or three of the races comprising a select four are canceled, or three or four of the races comprising a select five are canceled, the net amount of the pari-mutuel pool shall be distributed as provided in paragraph (2) of this subsection.

(g) A carryover select [~~three,~~] four[,] or five pari-mutuel pool shall be distributed in accordance with this subsection. The net pool in the select [~~three,~~] four[,] or five pool is divided into a major pool and a minor pool. The association shall designate the major pool to consist of 75% of the net amount wagered on the select [~~three,~~] four[,] or five pool. The remaining 25% constitutes the minor pool.

(1) The major pool shall be distributed among holders of select [~~three,~~] four[,] or five tickets, which correctly designate the winner in each of the races comprising the select [~~three,~~] four[,] or five.

(2) Except as otherwise provided by this section, the minor pool shall be distributed to those ticket holders who failed to correctly designate the winner in each of the races comprising the select [~~three,~~] four[,] or five, but who correctly selected the winners in the most, but not all of, the races comprising the select [~~three,~~] four[,] or five. If there are no such tickets, then the minor pool would be added to the major pool and:

(A) Paid out to holders of tickets who correctly designated the winner in each of the races comprising the select [~~three,~~] four[,] or five, but if there are no such tickets,

(B) Carried forward to the next select [~~three,~~] four or five pool offered.

(3) If no ticket is sold that designates the winner in each of the races comprising the select [~~three,~~] four[,] or five, the major pool shall be carried forward to the next select [~~three,~~] four or five pool offered to be paid in the major pool.

(4) Except as otherwise provided by this section, the major pool shall be supplemented each performance by the amount added to the pool from all previous performances' major pools that have not been won in accordance with paragraph (1) of this subsection.

(5) If on the last performance of the race meeting or on a designated mandatory payout performance the major pool is not distributable under paragraph (1) of this subsection, the major pool and all money carried forward into that pool from previous performances shall be combined with the minor pool and distributed to the holders of tickets correctly designating the most, but not all, of the races comprising the select [~~three,~~] four[,] or five.

(6) Except as otherwise provided by this subsection, if one or more of the races comprising a select [~~three,~~] four[,] or five is canceled or declared a "no race", the amount contributed to the major pool for that select [~~three,~~] four[,] or five shall be added to the minor pool for that same select [~~three,~~] four[,] or five and distributed as an extra amount in the minor pool to the holders of the tickets that designate the most winners in the remaining races. All contributions to the major pool from prior select [~~three,~~] four[,] or five pools shall remain in the major pool, to be carried forward to the next select [~~three,~~] four[,] or five pool to be paid in the major pool later on the race card or on the next performance.

(h) If all of the races comprising the select [~~three,~~] four[,] or five are canceled, the association shall refund the pari-mutuel tickets sold on the select [~~three,~~] four[,] or five on that day. The association shall carry over the remaining amount in the select [~~three,~~] four[,] or five pari-mutuel pool to the next consecutive select [~~three,~~] four[,] or five pari-mutuel pool.

(i) When the condition of the turf course warrants a change of racing surface in any of the races open to select four or five wagering, and such change has not been made known to the betting public prior to the close of wagering for the first select four or five race, the Stewards shall declare the changed races a "no contest" select four or five for wagering purposes and the pool shall be distributed in accordance with subsection (g) of this section. Following the designation of a race as a "no contest", no tickets shall be sold selecting a horse in such "no contest" race.

(j) [~~(i)~~] If a selection on a select [~~three,~~] four[,] or five ticket in one or more of the races is scratched or determined by the stewards or racing judges to be a nonstarter in the race, the actual favorite, as shown by the largest amount wagered in the win pool at the time of the start of the race, will be substituted for the non starting selection for all purposes, including pool calculations and payoffs. If there are two or more favorites in the win pool, both favorites will be substituted for the non-starting selection.

(k) [~~(j)~~] In the event of a dead heat for win between two or more animals[~~:~~]

[~~(1) in a select three, all the animals in the dead heat for win shall be considered as winning animals in the race for the purpose of calculating the major or minor pools and the affected pool is calculated:~~]

[~~(A) As a profit split to those whose selections finished first in each of the three contests; but if there are no such wagers, then~~]

[~~(B) As a single price pool to those who selected the first place finisher in any two of the three contests; but if there are no such wagers, then~~]

[~~(C) As a single price pool to those who selected the first place finisher in any one of the three contests; but if there were no such wagers, then in accordance with paragraph (f) of this section.~~]

[~~(2)~~] in a select four or five race, all the animals in the dead heat for win shall be considered as winning animals in the race for the purpose of calculating the major or minor pools and the affected pool is calculated as a win pool.

(l) [~~(k)~~] A pari-mutuel ticket for the select [~~three,~~] four[,] or five pool may not be sold, exchanged, or canceled after the time wagering closes in the first of the races comprising the select [~~three,~~] four[,] or five, except for refunds on select [~~three,~~] four[,] or five tickets as required by subsection (h) of this section. A person may not disclose the number of tickets sold in the select [~~three,~~] four[,] or five pool or the number or amount of tickets selecting winners of select [~~three,~~] four[,] or five races until the stewards or racing judges have determined the last race comprising the select [~~three,~~] four[,] or five to be official.

§321.319. Select Three.

(a) The select three is not a parlay and has no connection with or relation to the win, place, and show pools shown on the tote board.

(b) A select three ticket is evidence of a binding contract between the holder of the ticket and the association and the ticket constitutes an acceptance of this section. The association may select a distinctive name for the select three with the prior approval of the executive secretary.

(c) The select three pari-mutuel pool consists of amounts contributed for a selection to win only on each of three races designated by the association with the approval of the executive secretary. Each person purchasing a select three ticket shall designate the winning animal in each of the races comprising the select three pool.

(d) A coupled entry or mutuel field in a race that is part of the select three shall race as a single betting interest for the purpose of the select three pari-mutuel pool calculations and payoffs to the public. If any part of a coupled entry or mutuel field is a starter in a race, the entry or field selection remains as the designated selection to win in that race for the select three calculation, and the selection may not be deemed a scratch.

(e) The select three pari-mutuel pool may be a carryover pool or a non-carryover pool. The association, with prior approval of the executive secretary, will decide if the select three pari-mutuel pool will be offered as a carryover pool or a non-carryover pool.

(f) A non-carryover select three pari-mutuel pool shall be distributed in accordance with this subsection. One hundred percent of the net amount in the pari-mutuel pool subject to distribution among winning ticket holders shall be distributed among the holders of pari-mutuel tickets which:

(1) Correctly designate the official winner in each of the races comprising the select three.

(2) If no pari-mutuel ticket is sold combining the winners of all of the races comprising the select three, 100% of the net amount in the pari-mutuel pool shall be distributed among the holders of pari-mutuel tickets which include the winners of the next highest number of winners of the races in the select three pool.

(3) If no pari-mutuel ticket is sold that would require distribution of the select three pool under paragraphs (1) or (2) of this subsection, the association shall carry over all money wagered in the select three pool to the next consecutive select three pool.

(4) If the final day of a race meeting is canceled or the select three pool has not been distributed, the pool shall be deposited in an interest-bearing account approved by the executive secretary. The pool plus all accrued interest shall then be carried over and added to the select three pari-mutuel pool in the following race meeting on a date and performance designated by the executive secretary.

(5) If one or two of the races comprising a select three is canceled, the net amount of the pari-mutuel pool shall be distributed as provided in paragraph (2) of this subsection.

(g) A carryover select three pari-mutuel pool shall be distributed in accordance with this subsection. The net pool in the select three pool is divided into a major pool and a minor pool. The association shall designate the major pool to consist of 75% of the net amount wagered on the select three pool. The remaining 25% constitutes the minor pool.

(1) The major pool shall be distributed among holders of select three tickets, which correctly designate the winner in each of the races comprising the select three pool.

(2) Except as otherwise provided by this section, the minor pool shall be distributed to those ticket holders who failed to correctly designate the winner in each of the races comprising the select three, but who correctly selected the winners in the most, but not all of, the races comprising the select three. If there are no such tickets, then the minor pool would be added to the major pool and:

(A) Paid out to holders of tickets who correctly designated the winner in each of the races comprising the select three, but if there are no such tickets,

(B) Carried forward to the next select three pool offered.

(3) If no ticket is sold that designates the winner in each of the races comprising the select three, the major pool shall be carried forward to the next select three pool offered to be paid in the major pool.

(4) Except as otherwise provided by this section, the major pool shall be supplemented each performance by the amount added to the pool from all previous performances' major pools that have not been won in accordance with paragraph (1) of this subsection.

(5) If on the last performance of the race meeting or on a designated mandatory payout performance the major pool is not distributable under paragraph (1) of this subsection, the major pool and all money carried forward into that pool from previous performances shall be combined with the minor pool and distributed to the holders of tickets correctly designating the most, but not all, of the races comprising the select three.

(6) Except as otherwise provided by this subsection, if one or more of the races comprising a select three is canceled or declared a "no race", the amount contributed to the major pool for that select three shall be added to the minor pool for that same select three and distributed as an extra amount in the minor pool to the holders of the tickets that designate the most winners in the remaining races. All contributions to the major pool from prior select three pools shall remain in the major pool, to be carried forward to the next select three pool to be paid in the major pool later on the race card or on the next performance.

(h) When the condition of the turf course warrants a change of racing surface in any of the races open to select three wagering, and such change has not been made known to the betting public prior to the close of wagering for the first select three race, the Stewards shall declare the changed races a "no contest" for select three wagering purposes and the pool shall be distributed in accordance with subsection (f) or (g) of this section. Following the designation of a race as a "no contest", no tickets shall be sold selecting a horse in such "no contest" race.

(i) If a scratch (which herein after includes being declared a non-starter or a non-betting starter) was made prior to the start of the first leg, all bets containing such scratched betting interest shall be refunded to determine the gross pool and removed from further consideration in the pool;

(j) If a scratch was made in the second leg after the start of the first leg, a consolation payoff shall be computed for those bets combining the winners of the first and third legs with the scratched betting interest as follows: from the gross pool shall be deducted the statutory take-out and then the amount represented by the bets on combinations involving betting interests scratched from the third leg (reduced by the take-out thereon). The resulting remainder shall be divided by the amounts bet on the combination of such first and third leg winners with all betting interests in the second leg (less breaks) to determine the consolation price per dollar payable to those bets combining win-

ners of the first and third legs with the betting interest scratched in the second leg. The break shall not be deducted from the pool.

(k) If a betting interest is scratched in the third leg after the start of the first leg, a consolation payoff shall be computed as for those bets combining the winners of the first and second legs with such scratched betting interest as follows: from the gross pool shall be deducted the statutory take-out and then the amount represented by bets on combinations involving betting interests scratched from the second leg (reduced by the rate of the take-out thereon). The resulting remainder shall be divided by the amount bet on the combination of such first and second leg winners with all betting interests in the third leg (less breaks) to determine the consolation price per dollar payable to those bets combining winners of the first and second legs with a betting interest scratched in the third leg. The breaks shall not be deducted from the pool.

(l) If betting interests are scratched in both the second and third legs after the start of the first leg, a consolation payoff shall be computed for those bets combining the winner of the first leg with the betting interests scratched in both the second and third legs as follows: from the gross pool shall be deducted the takeout and the remainder shall be divided by the amount bet on the winner of the first leg combined with all other betting interests in the second and third legs (less breaks) to determine the consolation price per dollar payable to those tickets combining the winner of the first leg with the scratched betting interests from both the second and third legs.

(m) If all of the races comprising the select three are canceled, the association shall refund the pari-mutuel tickets sold on the select three on that day. The association shall carry over the remaining amount in the select three pari-mutuel pool to the next consecutive select three pari-mutuel pool.

(n) In the event of a dead heat all the animals in the dead heat for win shall be considered as winning animals in the race for the purpose of calculating the major or minor pools and the affected pool is calculated:

(1) As a profit split to those whose selections finished first in each of the three contests; but if there are no such wagers, then

(2) As a single price pool to those who selected the first place finisher in any two of the three contests; but if there are no such wagers, then

(3) As a single price pool to those who selected the first place finisher in any one of the three contests; but if there were no such wagers, then in accordance with subsections (f) or (g) of this section.

(o) A pari-mutuel ticket for the select three pool may not be sold, exchanged, or canceled after the time wagering closes in the first of the races comprising the select three, except for refunds on select three tickets as required by subsection (i) of this section. A person may not disclose the number of tickets sold in the select three pool or the number or amount of tickets selecting winners of select three races until the stewards or racing judges have determined the last race comprising the select three to be official.

§321.320. Super Hi-Five.

(a) The super hi-five is not a parlay and has no connection with or relation to the win, place, and show pools shown on the tote board. All tickets on the super hi-five shall be calculated as a separate pool.

(b) A person purchasing a super hi-five ticket shall select the five animals that will finish first, second, third, fourth, and fifth in one race. The pool shall be distributed only to the holders of tickets that select the same order of finish as officially posted.

(c) If no super hi-five ticket is sold for the winning combination, then the net pool shall be carried over and paid out in the following manner:

(1) The entire pool shall be carried over and made available on the next consecutive super hi-five pool, and is combined with and added to the net pool for such qualifying pool, and made available for payout, or

(2) An association can, at its option, announce a consolation pool, 25% of the net pool, will be offered. The offering of a consolation pool shall be announced at least 72 hours in advance of the first day upon which a consolation pool will be offered, and shall be publicized. Notice of the consolation pool may be announced, by way of example, via press release, internet, simulcast signal, and on-track announcements.

(3) If there are no ticket holders who selected first-place, second-place, third-place, fourth-place, and fifth-place finishers in order and a consolation pool is offered, then a consolation pool shall be established. The consolation pool shall be equal to 25% of the net pool and distributed as a single price pool among those ticket holders and paid out as follows:

(A) To those who selected first-place, second-place, third-place, and fourth-place finishers in order. If there are no such wagers, then

(B) To those who selected first-place, second-place, and third-place finishers in order. If there are no such wagers, then

(C) To those who selected first-place and second-place finishers in order. If there are no such wagers, then

(D) To those who selected the first-place finishers.

(E) If the super hi-five pool cannot otherwise be distributed in accordance with this section, the money in the super hi-five consolation pool shall be carried forward to the next consecutive super hi-five pool.

(d) The minimum number of wagering interests required to offer super hi-five wagering shall be seven actual starters.

(e) Super hi-five wagers on races in which wagering has been canceled or the race declared no contest shall be refunded. Any carryover pool added to the net pool of a super hi-five race which is canceled shall carry forward to be added to the next consecutive super hi-five wagering pool.

(f) If less than five animals finish and the race is declared official by the stewards or judges, then pay off shall be made to ticket holders selecting the finishing animals in order of finish as provided above.

(g) In the event of a dead heat in any finishing position, the wagers be paid as follows:

(1) All wagers selecting either of the dead-heat positions with the correct non-dead-heat position shall be winners and share in the pool;

(2) Payouts will be calculated by splitting the pool equally between each winning combination, then dividing split pools by the number of winning tickets. A dead heat will produce separate and distinct payouts respective to each winning combination.

(h) If the final day of a race meeting is canceled or the super hi-five pool has not been distributed, the pool shall be deposited in an interest-bearing account approved by the executive secretary. The pool plus all accrued interest shall then be carried over and added to the

super hi-five pari-mutuel pool in the following race meeting on a date and performance designated by the executive secretary.

(i) If an animal is scratched or declared a nonstarter, no further tickets may be issued designating such animal and all super hi-five tickets previously issued designating such animal shall be refunded and the money deducted from the gross super hi-five pool.

(j) For purposes of statutory deductions and commissions, the net amount does not include any amounts carried over from any previous super hi-five pool.

§321.321. Fortune Pick (n).

(a) The fortune pick (n) wager is not a parlay and has no connection with or relation to the win, place, and show pools shown on the tote board. All tickets on the fortune pick (n) shall be calculated as a separate pool.

(b) The fortune pick (n) pari-mutuel pool consists of amounts contributed for a selection to win only in each of six, seven, eight, nine, or 10 races designated by the association. After designating the number of races comprising the fortune pick (n), the association may not change the number during a race meeting without prior written approval of the executive secretary.

(c) A person purchasing a fortune pick (n) ticket shall designate the winning animal in each of the races comprising the fortune pick (n). The association shall issue to the purchaser of a fortune pick (n) ticket a ticket that reflects each of the purchaser's selections.

(d) A fortune pick (n) ticket is a contract between the holder of the ticket and the association and the ticket constitutes acceptance of this section. The association, totalisator company, and the State of Texas are not liable to a person for a fortune pick (n) ticket that is not a winning ticket under this section or for a fortune pick (n) ticket that is not delivered.

(e) A coupled entry or mutuel field in a race that is part of the fortune pick (n) races shall race as a single betting interest for the purpose of mutuel pool calculations and payoffs to the public.

(f) The fortune pick (n) pool shall be distributed as provided by this section. The net pool in the fortune pick (n) pool is divided into a major pool and a minor pool. The association may designate the major pool to consist of either 75% or 50% of the net amount wagered on the fortune pick (n). The remaining percentage constitutes the minor pool. The association shall notify the executive secretary in writing before the beginning of each race meeting of its designation regarding the division between the major and minor pools. After designating the division between the major and minor pools, an association may not change the division during a race meeting without prior written approval of the executive secretary.

(g) Fortune pick (n) with minor pool and carryover with unique wager: the entire net fortune pick (n) pool and carryover, if any, shall be distributed to the holder of a unique wager selecting the first place finisher in each of the selected fortune pick (n) contests, based upon the official order of finish. If there is no unique wager selecting the first place finisher in all fortune pick (n) contests, the minor share of the net fortune pick (n) pool shall be distributed as a single price pool to those who selected the first place finisher in the greatest number of fortune pick (n) contests; and the major share shall be added to the carryover.

(h) Unique wager, as used in this rule, shall be defined as having occurred when the total amount wagered on a winning combination selecting the first place finisher in each of the selected fortune pick (n) contests, based upon the official order of finish, is equal to the minimum allowable wager.

(i) If there is a dead heat for first in any of the fortune pick (n) contests involving:

(1) Contestants representing the same betting interest, the fortune pick (n) pool shall be distributed as if no dead heat occurred.

(2) Contestants representing two or more betting interests, the fortune pick (n) pool shall be distributed as a single price pool with each unique winning wager receiving an equal share of the profit.

(j) Should a betting interest in any of the fortune pick (n) contests be scratched, excused, or determined to be a non-starter, all tickets sold containing the scratched animal shall be refunded. The money refunded will be deducted from the gross pool.

(k) Except as otherwise provided by this subsection, if one or more races in the fortune pick (n) are canceled or declared a "no race", the amount contributed to the major pool for that performance shall be added to the minor pool for that performance and distributed as an extra amount in the minor pool to the holders of the tickets that designate the most winners in the remaining races. All contributions to the major pool from prior performances shall remain in the major pool, to be carried forward to the next performance to be paid in the major pool for that performance. If the stewards or racing judges cancel or declare as a "no race" three or more of the races comprising a fortune pick six, seven, or eight, four or more of the races comprising the pick nine, or five or more of the races comprising the pick 10, the fortune pick (n) is canceled and the association shall refund all pick (n) tickets. A person may not win the major pool unless the person holds a fortune pick (n) ticket that correctly designates the official winners of all the scheduled races comprising the fortune pick (n) for that performance. On the last performance of a race meeting or on a designated mandatory payout performance, if one or two races comprising the pick (l) are canceled or declared a "no race", the major pool and the minor pool for that performance shall be combined with the prior performance major pool and be paid to those holders of tickets who correctly designated the most winners of the remaining races of the fortune pick (n). If three or more races comprising the fortune pick (n) are canceled or declared a "no race", the association shall refund all fortune pick (n) tickets and the prior performance major pool shall be distributed in accordance with subsection (m) of this section.

(l) When the condition of the turf course warrants a change of racing surface in any of the races open to fortune pick (n) wagering, and such change has not been made known to the betting public prior to the close of wagering for the first fortune pick (n) race, the Stewards shall declare the changed races a "no contest" for fortune pick (n) wagering purposes and the pool shall be distributed in accordance with subsection (k) of this section. Following the designation of a race as a "no contest", no tickets shall be sold selecting a horse in such "no contest" race.

(m) If on the last performance of the race meeting or on a designated mandatory payout performance the major pool is not distributable under subsection (g) of this section, the major pool and all money carried forward into that pool from previous performances shall be combined with the minor pool and distributed to the holders of tickets correctly designating the most, but not all, of the races comprising the fortune pick (n) for that performance.

(n) If the final or designated mandatory payoff performance is canceled or the major pool has not been distributed, the major pool shall be deposited in an interest-bearing account approved by the executive secretary. The major pool plus all accrued interest shall then be carried over and included in a major pool offered on one of the first five days of the next subsequent race meeting or on the next performance after the undistributed mandatory payout performance, as approved by the executive secretary.

(o) Except for refunds required by this section, a fortune pick (n) ticket may not be sold, exchanged, or canceled after the close of wagering on the first of the fortune pick (n) races.

(p) A person may not disclose the number of tickets sold in the fortune pick (n) pool or the number or amount of tickets selecting winners of the races comprising the fortune pick (n) until the results of the last race comprising the fortune pick (n) are official. The totalisator equipment shall be programmed or constructed to suppress the publication or printing of any such information, except the total number of dollars wagered in the fortune pick (n), until the results of the last race comprising the fortune pick (n) are official.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007021
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

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SUBCHAPTER D. SIMULCAST WAGERING
DIVISION 1. GENERAL PROVISIONS

16 TAC §321.417

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.417. Emergency Procedures.

(a) If an association is unable to establish or to maintain the audio or video signal from a host racetrack, the association shall immediately notify the host racetrack of the lost signal and may continue to accept wagers for four hours [~~30 minutes~~] while attempting to establish the signal.

(b) If after four hours [~~30 minutes~~] the audio or video signal cannot be established the association may continue to accept wagers on the signal provided:

(1) the mutuel manager makes an announcement to the public informing them that due to technical difficulties the audio or video signal has been lost;

(2) the association transmits the odds on the affected race to the video department to be displayed to the patrons; and

(3) the totalisator operator locks all wagering on the affected race at zero minutes to post to ensure the integrity and transfer of the wagering pools.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 3. SIMULCASTING AT HORSE RACETRACKS

16 TAC §321.503

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.503. Purses.

(a) To be approved by the executive secretary, an association's request for approval to import a simulcast must allocate for purses as follows:

(1) for a same species simulcast, as provided by the Act, §6.08; and

(2) for a cross-species simulcast, as provided in the contract with the officially recognized horsemen's organization.

(b) An [~~To be approved by the executive secretary, an~~] association's request for approval to export a simulcast must allocate a minimum of 37.0% for purses from the simulcast fee charged to the guest racetrack, unless otherwise approved by the recognized horsemen's organization and the executive secretary.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

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SUBCHAPTER E. TICKETLESS ELECTRONIC WAGERING
DIVISION 1. CONDUCT OF E-WAGERING

16 TAC §321.605

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to license and regulate pari-mutuel wagering.

The proposed amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.605. E-Wagering Plan.

(a) To be approved to conduct E-wagering, an association must submit a plan to the executive secretary. The plan must include:

(1) - (4) (No change.)

(5) the procedures for closing an account; [~~and~~]

(6) the procedures for suspending an account; and

(7) [~~(6)~~] a description of the totalisator system and E-wagering access system.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

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Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 833-6699

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.18

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.18, Appraiser Continuing Education (ACE). The proposed amendments clarify the duration of course approval and the process for revoking the approval of courses.

Devon V. Bijansky, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments. There is no anticipated impact on local or state employment as a result of implementing the amendments. There may be a minor economic impact as a result of implementing the amendments on certain small businesses, micro-businesses, or persons required to comply with the proposed amendments, as approval of some courses may be for a shorter time period, but this impact is outweighed by the public benefit of more current information presented in continuing education courses.

Ms. Bijansky has also determined that the anticipated public benefit as a result of these amendments is more current courses and a greater ability to ensure compliance with Appraiser Qualifications Board requirements for continuing education courses.

Comments on the proposed amendments may be submitted to Devon V. Bijansky, General Counsel, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Texas Occupations Code, §1103.151, Rules Relating to Certificates and Licenses.

The statute affected by this proposal is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the proposed amendments.

§153.18. Appraiser Continuing Education (ACE).

(a) - (b) (No change.)

(c) Approval of ACE courses. In approving ACE courses, the board shall base its review and approval of ACE courses upon the then current appraiser qualifications criteria of the Appraiser Qualifications Board (AQB).

(1) (No change.)

(2) The following types of educational offerings that may be accepted for meeting the ACE requirements are listed in subparagraphs (A) - (I) [~~(H)~~] of this paragraph:

(A) (No change.)

(B) The board shall accept as continuing education any continuing education offering that has been approved by the AQB [~~Appraiser Qualifications Board~~] course approval process or by another state appraiser licensing and certification board. Course providers may obtain prior approval of continuing education offerings by filing forms prescribed by the board and submitting a letter indicating that the course has been approved by the AQB [~~Appraiser Qualifications Board~~] under its course approval process or by another state appraiser licensing and certification board. Approval of a course based on AQB approval shall expire on the date of expiration of the AQB approval and shall be automatically revoked upon the revocation of AQB approval. Approval of a course based on any other authority shall expire on the earlier of the date of expiration in another state, if applicable, or two years from board approval and shall be automatically revoked upon the revocation of the other state's approval.

(C) - (H) (No change.)

(I) If the board determines that a course no longer complies with the requirements for approval, it may suspend or revoke the approval. Proceedings to suspend or revoke approval of a course shall be conducted in accordance with the board's disciplinary provisions for certifications, licenses, authorizations, or registrations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006930

Devon V. Bijansky
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 465-3938

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PART 9. TEXAS MEDICAL BOARD

CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §185.4, §185.6

The Texas Medical Board (Board) proposes amendments to §185.4, concerning Procedural Rules for Licensure Applicants, and §185.6, concerning Annual Renewal of License.

The amendment to §185.4 corrects the name for the Accreditation Review Commission on Education for the Physician Assistant, Inc. (ARC-PA) and corrects a rule citation.

The amendment to §185.6 provides that CME may be approved by the board for course credit.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the proposal will be to provide correct information and citations in board rule to avoid confusion and to encourage physician assistants to serve as expert consultants for the board by providing CME credit for time spent in becoming eligible to be a consultant.

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §204.101, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§185.4. Procedural Rules for Licensure Applicants.

(a) Except as otherwise provided in this section, an individual shall be licensed by the board before the individual may function as a physician assistant. A license shall be granted to an applicant who:

(1) submits an application on forms approved by the board;

(2) pays the appropriate application fee as prescribed by the board;

(3) has successfully completed an educational program for physician assistants or surgeon assistants accredited by the Accreditation Review Commission on [~~for the~~] Education for the [~~of~~] Physician Assistant, Inc. [~~Assistants~~] (ARC-PA), or by that committee's predecessor or successor entities, and holds a valid and current certificate issued by the National Commission on Certification of Physician Assistants ("NCCPA");

(4) certifies that the applicant is mentally and physically able to function safely as a physician assistant;

(5) does not have a license, certification, or registration as a physician assistant in this state or from any other licensing authority that is currently revoked or on suspension or the applicant is not subject to probation or other disciplinary action for cause resulting from the applicant's acts as a physician assistant, unless the board takes that fact into consideration in determining whether to issue the license;

(6) is of good moral character;

(7) is of good professional character as defined under §185.2(8) [~~§185.1(7)~~] of this title (relating to Definitions).

(8) submits to the board any other information the board considers necessary to evaluate the applicant's qualifications;

(9) meets any other requirement established by rules adopted by the board; and

(10) must pass the national licensing examination required for NCCPA certification within no more than six attempts; and

(11) must pass the jurisprudence examination ("JP exam"), which shall be conducted on the licensing requirements and other laws, rules, or regulations applicable to the physician assistant profession in this state. The jurisprudence examination shall be developed and administered as follows:

(A) The staff of the Medical Board shall prepare questions for the JP exam and provide a facility by which applicants can take the examination.

(B) Applicants must pass the JP exam with a score of 75 or better within three attempts.

(C) An examinee shall not be permitted to bring medical books, compends, notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(D) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action.

(E) An applicant who is unable to pass the JP exam within three attempts must appear before a committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(F) A person who has passed the JP Exam shall not be required to retake the Exam for relicensure, except as a specific requirement of the board as part of an agreed order.

(b) - (e) (No change.)

§185.6. Annual Renewal of License.

(a) (No change.)

(b) The following documentation shall be submitted as part of the renewal process:

(1) Continuing Medical Education. As a prerequisite to the annual registration of a physician assistant's license, 40 hours of continuing medical education (CME) are required to be completed in the following categories:

(A) at least one-half of the hours are to be from formal courses:

(i) that are designated for Category I credit by a CME sponsor approved by the American Academy of Physician Assistants; or[.]

(ii) approved by the board for course credit.

(B) The remaining hours may be from Category II composed of informal self-study, attendance at hospital lectures, grand rounds, case conferences, or by providing volunteer medical services at a site serving a medically underserved population, other than at a site that is the primary practice site of the license holder, and shall be recorded in a manner that can be easily transmitted to the board upon request.

(C) A physician assistant shall receive one credit of continuing medical education for each hour of time spent up to 6 hours per year, as required by subparagraph (A) of this paragraph based on participation in a program sponsored by the board and approved for CME credit for the evaluation of a physician assistant's competency or practice monitoring.

(2) A physician assistant must report on the annual registration form if she or he has completed the required continuing medical education during the previous year. A licensee may carry forward CME credit hours earned prior to annual registration which are in excess of the 40 hour annual requirement and such excess hours may be applied to the following years' requirements. A maximum of 80 total excess credit hours may be carried forward and shall be reported according to whether the hours are Category I and/or Category II. Excess CME credit hours of any type may not be carried forward or applied to an annual report of CME more than two years beyond the date of the annual registration following the period during which the hours were earned.

(3) A physician assistant may request in writing an exemption for the following reasons:

(A) catastrophic illness;

(B) military service of longer than one year's duration outside the United States;

(C) residence of longer than one year's duration outside the United States; or

(D) good cause shown on written application of the licensee that gives satisfactory evidence to the board that the licensee is unable to comply with the requirement for continuing medical education.

(4) Exemptions are subject to the approval of the licensure committee of the board.

(5) A temporary exception under paragraph (3) of this subsection may not exceed one year but may be renewed annually, subject to the approval of the board.

(6) This section does not prevent the board from taking disciplinary action with respect to a licensee or an applicant for a license by requiring additional hours of continuing medical education or of specific course subjects.

(7) The board may require written verification of both formal and informal credits from any licensee within 30 days of request. Failure to provide such verification may result in disciplinary action by the board.

(8) Unless exempted under the terms of this section, a physician assistant licensee's apparent failure to obtain and timely report the 40 hours of CME as required and provided for in this section shall result in nonrenewal of the license until such time as the physician assistant obtains and reports the required CME hours; however, the executive director of the board may issue to such a physician assistant a temporary license numbered so as to correspond to the nonrenewed license. Such a temporary license shall be issued at the direction of the executive director for a period of no longer than 90 days. A temporary license issued pursuant to this subsection may be issued to allow the physician assistant who has not obtained or timely reported the required number of hours an opportunity to correct any deficiency so as not to require termination of ongoing patient care.

(c) (No change.)

(d) If the renewal fee and completed application form are not received on or before the expiration date of the permit, the fees set forth in Chapter 175 of this title (relating to Fees and Penalties) [(~~Fees, Penalties, and Applications~~)] shall apply.

(e) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-7016

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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board (Board) proposes amendments to §§187.8, 187.14, 187.27, 187.55, and 187.59, concerning Procedural Rules.

The amendment to §187.8, concerning Subpoenas, establishes that the party requesting the Board to issue a subpoena in relation to a case filed at the State Office of Administrative Hearings (SOAH) is responsible for accomplishing service of the subpoena.

The amendment to §187.14, concerning Informal Disposition of Disciplinary Issues Against a Licensee, provides that if the licensee fails to accept an offer of settlement by the Quality Assurance Committee, or if the licensee requests that an Informal Settlement Conference (ISC) be held, the offer shall be deemed to be rejected and an ISC shall be held which is the current process. The current language says that an ISC is to be scheduled rather than "held."

The amendment to §187.27, concerning Written Answers in SOAH Proceedings and Default Orders, amends the process for issuance of default orders. Under the proposed language if a licensee fails to timely file a response in a SOAH case, SOAH

may, at Board staff's request, remand the case to the Board and the Board will then rule on the staff attorney's motion for default and issue a default order if warranted. This differs from the current process that requires the Board's general counsel to make a determination of default before the case may be remanded by SOAH.

The amendment to §187.55, concerning Purpose, makes grammatical changes.

The amendment to §187.59, concerning Evidence, provides that documentary evidence for temporary suspension hearings with notice must be prefiled with the Board 24 hours prior to the scheduled hearing. Admission of documentary evidence after the 24 hours shall be admitted only upon a showing of good cause. In addition, documentary evidence must be submitted in electronic format in all cases where the Respondent has been provided notice that a panel member will be appearing by phone.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be: to not use the Board's resources in serving subpoenas requested by opposing parties; to have the Board's rules correctly reflect the Board's actual procedures; to have only the Board make determinations of default that are the basis for default orders; to have rules that are not confusing due to grammatical errors and to ensure that evidence is timely submitted in temporary suspension hearings and that all panel members have copies of presented evidence.

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with the rules as proposed will be the costs associated with serving subpoenas and costs associated with prefiling evidence in electronic format for temporary suspension hearings. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

22 TAC §187.8

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.8. Subpoenas.

(a) (No change.)

(b) SOAH Subpoenas. Subsequent to the filing of a formal Complaint, any party may request in writing that the executive director issue a subpoena or subpoena duces tecum in accordance with §2001.089 of the APA upon a showing of good cause.

(1) The party requesting the subpoena shall be responsible for the payment of any expense [~~incurred in serving the subpoena, as well as reasonable and necessary expenses~~] incurred by the witness who appears in response to the subpoena.

(2) If the subpoena is for the attendance of a witness, the written request shall contain the name, address, and title, if any, of the witness and the date and location at which the attendance of the witness is sought.

(3) If the subpoena is for the production of books, records, writings, or other tangible items, the written request shall contain a description of the item sought; the name, address, and title, if any, of the person or entity who has custody or control over the items and the date; and the location at which the items are sought to be produced.

(4) The party requesting a subpoena duces tecum shall describe and recite with clarity, specificity, and particularity the books, records, documents to be produced.

(c) Service and expenses.

(1) A subpoena issued at the request of the board's staff may be served either by a board investigator or by certified mail in accordance with the Act §153.007. The board shall pay reasonable charges for photocopies produced in response to a subpoena requested by the board's staff, but such charges may not exceed those billed by the board for producing copies of its own records.

(2) A subpoena issued at the request of any party other than the board shall be addressed to a sheriff or constable for service in accordance with the APA §2001.089, and given to the requesting party so that the requesting party may accomplish service of the subpoena.

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-7016

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SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §187.14

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.14. Informal Resolution of Disciplinary Issues Against a Licensee.

Pursuant to §§164.003 - 164.004 of the Act and §§2001.054 - 2001.056 of the Administrative Procedure Act (APA), the following rules shall apply to informal resolution:

(1) Any matter within the board's jurisdiction may be resolved informally by agreed order, dismissal, or default.

(2) Prior to the imposition of any disciplinary action against a licensee, the licensee shall be given the opportunity to show compliance with all the requirements of the law for the retention of an unrestricted license before one or more board representatives.

(3) If a determination is made by the board representatives that there has been no violation, the board representatives may recommend that the complaint or allegations be dismissed.

(4) If a determination is made by the board representatives that a licensee has violated the Act, board rules, or board order, the board representatives may make recommendations for resolution of the issues to be reduced to writing and processed in accordance with §187.19 of this title (relating to Resolution by Agreed Order).

(5) An opportunity for the licensee to show compliance shall not be required prior to a temporary suspension under §164.059 of the Act, or in accordance with the terms of an agreement between the board and a licensee.

(6) Any modification made by the board to any proposed agreed order before the initial effective date of the order must be approved by the licensee.

(7) Informal Resolution of Violations.

(A) The Quality Assurance ("QA") Committee may recommend dismissal or an agreed settlement of any complaint.

(B) The QA Committee shall include designated board members, district review committee members, and board staff members.

(C) The QA Committee shall review all complaints referred by the investigation division to determine whether the complaint should be accepted for legal action.

(D) If the QA Committee determines that an offer of settlement should be made regarding a complaint the offer of settlement shall be presented to the licensee.

(i) If the licensee accepts the offer of settlement, the signed proposed order shall be presented to the board at a public meeting for approval.

(ii) If the licensee fails to timely accept the offer of settlement, or if the licensee requests that an Informal Settlement Conference (ISC) be held, the offer shall be deemed to be rejected and an ISC shall be held [~~scheduled~~].

(E) Agreed settlements reached under these provisions shall be called "Corrective Orders."

(F) Corrective Orders can only be offered by the QA Committee, and shall not be available after an ISC is convened.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

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Executive Director
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For further information, please call: (512) 305-7016

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SUBCHAPTER C. FORMAL BOARD PROCEEDINGS AT SOAH

22 TAC §187.27

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.27. Written Answers in SOAH Proceedings and Default Orders.

(a) Written Answers in SOAH Proceedings. As authorized by SOAH rules, a respondent is required to file a written answer to the Complaint within 20 days after the date that service of the Complaint is complete, as provided in §187.26(c) of this title (relating to Service in SOAH Proceedings), the respondent shall file a written answer with the State Office of Administrative Hearings and with the Hearings Coordinator of the board.

(b) Default Orders.

(1) If no written answer has been filed within 20 days after the date of service, the board attorney assigned to the matter shall file a motion to remand with SOAH and respondent based on respondent's default. [~~shall present the administrative record of the case to the General Counsel for the board, including the Complaint. The General Counsel shall determine whether the Complaint was properly served.~~]

(2) If the case is remanded, the staff attorney shall present to the board a motion for default. After consideration of the Complaint and the motion for default, the board may then make a Determination of Default and issue a Default Order deeming the allegations in the Complaint as true.

[~~(2) In the event the General Counsel determines that the Complaint was properly served and that respondent has failed to timely file a written answer, as required by subsection (a) of this section, the General Counsel shall issue a Determination of Default, which shall be served on respondent and filed at SOAH. The Determination of Default shall specifically state the facts on which the General Counsel has based the Determination of Default, and summarize the requirements by which a Determination of Default or Default Order may be set aside, as provided in paragraphs (4) - (7) of this subsection. At the time of the issuing of the Determination of Default by the General Counsel, the Board Staff attorney shall file a motion with SOAH requesting that the matter be remanded to the Board to allow consideration of the Determination of Default, and serve the motion on respondent.~~]

[~~(3) An answer received after a Determination of Default has been issued shall not be filed.~~]

[~~(4) In the event that the respondent wishes to file an answer after a Determination of Default has been issued, but before a Default Order has been adopted by the board, the respondent must file a Motion to Set Aside the Determination of Default, which shall show the board that:~~]

[(A) the failure to timely file a written answer was not intentional or the result of conscious indifference but was due to a mistake or accident;]

[(B) respondent has a meritorious defense; and]

[(C) the setting aside of the Determination of Default will not cause any delay or injury to the board.]

[(5) The board shall consider the Complaint, the Determination of Default, and any Motion to Set Aside the Determination of Default, at a meeting of the board not less than twenty days after the date of the Determination of Default. If the board concurs with the findings in the Determination of Default, the board may deem the allegations in the Complaint as true and enter a Default Order.]

(3) [(6)] In the event that the respondent wishes to file an answer after a Default Order has been entered by the board[, but before the time for filing a Motion for Rehearing has expired,] the respondent must file a Motion for Rehearing to Set Aside Default Order within 20 days after the issuance of the Default Order, which shall show that:

(A) the failure to timely file a written answer was caused by fraud, accident, or wrongful act or official mistake of the board;

(B) the failure to timely file a written answer was not the result of respondent's fault or negligence; and

(C) the respondent has a meritorious defense.

(4) [(7)] The Motion for Rehearing shall be supported by affidavits and documentary evidence that present a prima facie case for a meritorious defense.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-7016

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SUBCHAPTER F. TEMPORARY SUSPENSION PROCEEDINGS

22 TAC §187.55, §187.59

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.55. Purpose.

The purpose of a temporary suspension proceeding is to [will] determine whether a person's license to practice medicine should be temporarily suspended in accordance with the Act, §164.059.

§187.59. Evidence.

(a) In accordance with the Administrative Procedure Act (APA), §2001.081, the determination of the disciplinary panel may be based not only on evidence admissible under the Texas Rules of Evidence, but may be based on information of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs, necessary to ascertain facts not reasonably susceptive of proof under those rules, and not precluded by statute.

(b) Questioning of witnesses by the parties or panel members shall be under the control of the chair of the disciplinary panel with due consideration being given to the need to obtain accurate information and prevent the harassment or undue embarrassment of witnesses.

(c) In receiving information on which to base its determination of a continuing threat to the public welfare, the disciplinary panel may accept the testimony of witnesses by telephone.

(d) Documentary evidence must be prefiled with the board 24 hours prior to the scheduled hearing. Admission of documentary evidence after the 24 hours shall be admitted only upon a showing of good cause.

(e) Documentary evidence must be submitted in electronic format in all cases where the Respondent has been provided notice that a panel member will be appearing by phone.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Executive Director
Texas Medical Board
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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.2

The Texas State Board of Pharmacy proposes amendments to §281.2, concerning Definitions. The proposed amendments, if adopted, define confidential address of record and public address of record.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that licensees and registrants provide correct address information to the Board. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §§551.002, 554.051, and 555.001 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §555.001(d) as authorizing the agency to consider the home address and telephone number of a person licensed or registered by the Board, including a pharmacy owner as confidential and not subject to disclosure but each person licensed or registered must provide the Board with an address of record that is subject to disclosure.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.2. Definitions.

The following words and terms, when used in this chapter, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise:

(1) Act--The Texas Pharmacy Act, Chapters 551 - 566, Texas Occupations Code, as amended.

(2) Administrative law judge--A judge employed by the State Office of Administrative Hearings.

(3) Agency--The Texas State Board of Pharmacy, and its divisions, departments, and employees.

(4) Administrative Procedure Act (APA)--Government Code, Chapter 2001, as amended.

(5) Board--The Texas State Board of Pharmacy.

(6) Confidential address of record--The home address required to be provided by each individual, who is a licensee, registrant, or pharmacy owner and where service of legal notice will be sent. The address is confidential, as set forth in §555.001(d) of the Act, and not subject to disclosure under the Public Information Act.

(7) [~~(6)~~] Contested case--A proceeding, including but not restricted to licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for adjudicative hearing.

(8) [~~(7)~~] Diversion of controlled substances--An act or acts which result in the distribution of controlled substances from legitimate pharmaceutical or medical channels in violation of the Controlled Substances Act or rules promulgated pursuant to the Controlled Substances Act or rules relating to controlled substances promulgated pursuant to this Act.

(9) [~~(8)~~] Executive director/secretary--The secretary of the board and executive director of the agency.

(10) [~~(9)~~] License--The whole or part of any agency permit, certificate, approval, registration, or similar form of permission required by law.

(11) [~~(10)~~] Licensee--Any individual or person to whom the agency has issued any permit, certificate, approved registration, or similar form of permission authorized by law.

(12) [~~(11)~~] Licensing--The agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(13) [~~(12)~~] Official act--Any act performed by the board pursuant to a duty, right, or responsibility imposed or granted by law, rule, or regulation.

(14) [~~(13)~~] Person--An individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(15) [~~(14)~~] President--The president of the Texas State Board of Pharmacy.

(16) [~~(15)~~] Presiding Officer--The president of the Texas State Board of Pharmacy or, in the president's absence, the highest ranking officer present at a Board meeting.

(17) Publicly available address of record--The alternate address required to be provided by each licensee, registrant, or pharmacy owner, which will be released to the public, as set forth in §555.001(d) of the Act, and is subject to disclosure under the Public Information Act.

(A) If the licensee or registrant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address.

(B) The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(C) A pharmacy must provide the physical address of the pharmacy to be used for this purpose.

(18) [~~(16)~~] Quorum--A majority of the members of the board appointed and serving on the board.

(19) [~~(17)~~] State Office of Administrative Hearings (SOAH)--The agency to which contested cases are referred by the Texas State Board of Pharmacy.

(20) [~~(18)~~] Sample--A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(21) [~~(19)~~] Texas Public Information Act--Government Code, Chapter 552.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8028

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SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE

22 TAC §281.30

The Texas State Board of Pharmacy proposes an amendment to §281.30, concerning Notice and Service for Hearing. The proposed amendment, if adopted, clarifies notice and service of hearing will be sent to the party's addresses including confidential and public address of record.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that licensees and registrants receive proper notice of hearing. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendment may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendment is proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.30. Notice and Service for Hearing.

The board may serve notice of a contested case hearing at the State Office of Administrative Hearings by sending it to the party's last known addresses [~~address~~] as shown by the board's records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §§283.4, 283.7, 283.8

The Texas State Board of Pharmacy proposes amendments to §283.4, concerning Internship Requirements, §283.7, concerning Examination Requirements, and §283.8, concerning Reciprocity Requirements. The proposed amendments, if adopted, clarify application requirements for pharmacists and interns; and change the word shall to the word must.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that licensees and registrants provide appropriate information on applications. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§283.4. Internship Requirements.

(a) - (b) (No change.)

(c) College-/School-Based Internship Programs.

(1) Internship experience acquired by student-interns.

(A) An individual may be designated a student-intern provided he/she [~~meets all of the following requirements~~]:

(i) submits an [~~has made~~] application to the board that includes the following information:[~~;~~]

(I) name;

(II) addresses, phone numbers, date of birth, and social security number;

(III) college of pharmacy and expected graduation date; and

(IV) any other information requested on the application.

(V) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(ii) is enrolled in the professional sequence of a college/school of pharmacy whose professional degree program has been accredited by ACPE and approved by the board;

(iii) has successfully completed the first professional year and obtained a minimum of 30 credit hours of work towards a professional degree in pharmacy; and

(iv) has met all requirements necessary in order for the board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs.

(B) The terms of the student internship is [~~shall be~~] as follows.

(i) The student internship must [~~shall~~] be gained concurrent with college attendance, which may include:

(I) partial semester breaks such as spring breaks;

(II) between semester breaks; and

(III) whole semester breaks provided the student-intern attended the college/school in the immediate preceding semester and is scheduled with the college/school to attend in the immediate subsequent semester.

(ii) The student internship must [~~shall~~] be obtained in pharmacies licensed by the board, federal government pharmacies, or in a board-approved program.

(iii) The student internship must [~~shall~~] be in the presence of and under the supervision of a healthcare professional preceptor or a pharmacist preceptor.

(C) None of the internship hours acquired outside of a school-based program may be substituted for any of the hours required in a Texas college/school of pharmacy internship program.

(2) Expiration date for student-intern designation.

(A) The student-internship expires:

(i) if the student-intern voluntarily or involuntarily ceases enrollment, including suspension, in a college/school of pharmacy whose professional degree program has been accredited by ACPE and approved by the board;

(ii) the student-intern fails the NAPLEX and/or Texas Jurisprudence Examinations specified in this section; or

(iii) the student-intern fails to take the NAPLEX and/or Texas Jurisprudence Examinations within three calendar months after graduation.

(B) The executive director of the board, in his/her discretion may extend the term of the student internship if administration of the NAPLEX or Texas Jurisprudence Examinations is suspended or delayed.

(3) Texas colleges/schools of pharmacy internship programs.

(A) The board shall review for approval Texas colleges/schools of pharmacy internship programs of each fiscal year. The purpose of the board review will be to determine if such internship programs demonstrate that the competency objectives listed in subsection (a) of this section are being met by each student-intern completing the internship. The board reserves the right to set conditions relating to the approval of such programs.

(B) The Texas colleges/schools of pharmacy must [~~shall~~] determine that each student-intern completing the college/school internship program demonstrates through assessment the competency objectives listed in subsection (a) of this section.

(C) Internship experience must [~~shall~~] be gained under a preceptor.

(D) All internship experience must [~~shall~~] be approved by the board and must [~~shall~~] occur in sites and under conditions which teach one or more of the competency objectives listed in subsection (a) of this section.

(E) Prior to taking the licensure examination any applicant participating in a Texas college/school-based internship must [~~shall~~] complete the requirements of such internship.

(F) Intern-trainees and student-interns completing a board-approved Texas college/school-based structured internship must [~~shall~~] be credited the number of hours actually obtained and reported by the college. No credit will [~~shall~~] be awarded for didactic experience.

(G) No more than 600 hours of the required 1,500 hours may be obtained under a healthcare professional preceptor except when a pharmacist-intern is working in a federal government pharmacy.

(H) Individuals enrolled in the professional sequence of a Texas college/school of pharmacy whose professional degree program has been accredited by ACPE and approved by the board may be designated as a intern-trainee provided he/she [~~meets all of the following requirements~~]:

(i) submits an [~~has made~~] application to the board that includes the following information:[~~;~~]

(I) name;

(II) addresses, phone numbers, date of birth, and social security number;

(III) college of pharmacy and expected graduation date; and

(IV) any other information requested on the application.

(V) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(ii) is enrolled in the professional sequence of a college/school of pharmacy whose professional degree program has been accredited by ACPE and approved by the board; and

(iii) has met all requirements necessary in order for the board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs. Such internship must [~~shall~~] remain in effect during the time the intern-trainee is enrolled in the first year of the professional sequence and must [~~shall~~] expire upon completion of the first year of the professional sequence or upon separation from the professional sequence.

(d) Extended-internship program.

(1) A person may be designated an extended-intern provided he/she has [~~made application to the board and~~] met one of the following requirements:

(A) passed NAPLEX and the Texas Pharmacy Jurisprudence Examination but lacks the required number of internship hours for licensure;

(B) applied to the board to take the NAPLEX and Texas Jurisprudence Examinations within three calendar months after graduation and has:

(i) graduated and received a professional degree from a college/school of pharmacy the professional degree program of which has been accredited by ACPE and approved by the board; or

(ii) completed all of the requirements for graduation and receipt of a professional degree from a college/school of pharmacy the professional degree program of which has been accredited by ACPE and approved by the board; or

(C) applied to the board to take the NAPLEX and Texas Jurisprudence Examinations within three calendar months after obtaining full certification from the Foreign Pharmacy Graduate Equivalency Commission;

(D) applied to the board for re-issuance of a pharmacist license which has expired for more than two years but less than ten years and has successfully passed the Texas pharmacy jurisprudence examination, but lacks the required number of hours of internship or continuing education required for licensure; or

(E) been ordered by the Board to complete an internship.

(2) In addition to meeting one of the requirements in paragraph (1) of this subsection, an applicant for an extended-internship must: [~~meet all requirements necessary in order for the Board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs.~~]

(A) submit an application to the board that includes the following information:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application.

(iv) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis; and

(B) meet all requirements necessary in order for the Board to access the criminal history records information, including submitting fingerprint information and being responsible for all associated costs.

(3) The terms of the extended-internship shall be as follows.

(A) The extended-internship must [~~shall~~] be board-approved and gained in a pharmacy licensed by the board, or a federal government pharmacy participating in a board-approved internship program.

(B) The extended-internship must [~~shall~~] be in the presence of and under the direct supervision of a pharmacist preceptor.

(4) The extended internship remains in effect for two years. However, the internship expires immediately upon:

(A) the failure of the extended-intern to take the NAPLEX and Texas Jurisprudence Examinations within three calendar months after graduation or Foreign Pharmacy Graduate Equivalency Commission (FPGEC) certification; or

(B) the failure of the extended-intern to pass the NAPLEX and Texas Jurisprudence Examinations specified in this section.

(5) The executive director of the board, in his/her discretion may extend the term of the extended internship if administration of the NAPLEX and/or Texas Jurisprudence Examinations is suspended or delayed.

(6) An applicant for licensure who has completed less than 500 hours of internship at the time of application must [~~shall~~] complete the remainder of the 1,500 hours of internship and have the preceptor certify that the applicant has met the objectives listed in subsection (a) of this section.

(e) - (g) (No change.)

§283.7. Examination Requirements.

Each applicant for licensure by examination must [~~shall~~] pass the Texas Pharmacy Jurisprudence Examination and the NAPLEX. The examination requirements are [~~shall be~~] as follows:

(1) Prior to taking the required examination, the applicant must:

(A) [~~shall~~] meet the educational and age requirements as set forth in §283.3 of this title (relating to Educational and Age Requirements); [~~and~~]

(B) [~~may be required to~~] meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs; and[~~.~~]

(C) submit an application to the board that includes the following information:

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application.

(iv) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(2) All applicants must [~~shall~~] pass NAPLEX, which includes, at a minimum, the following subject areas:

(A) chemistry;

(B) mathematics;

(C) pharmacy;

(D) pharmacology; and

(E) practice of pharmacy.

(3) Effective October 1, 1979, the following requirements apply.

(A) To pass NAPLEX, an applicant must [~~shall~~] make the following grades:

(i) a minimum grade of 60 on chemistry, mathematics, pharmacy, and pharmacology test;

(ii) a minimum grade of 75 on the practice of pharmacy test; and

(iii) a minimum average grade of 75 on the NAPLEX.

(B) Should the applicant fail to achieve a minimum grade of 60 in any of the tests set out in paragraph (2)(A) - (E) of this section or fail to achieve a minimum grade of 75 in the practice of pharmacy test or fail to achieve a minimum average grade of 75 in the NAPLEX, such applicant, in order to be licensed, is required to retake all tests until such time as the minimum average grades are achieved.

(4) Effective June 1, 1986, the following requirements apply.

(A) To pass the NAPLEX, an applicant must [~~shall~~] make a minimum average grade of 75.

(B) Should the applicant fail to achieve a minimum average grade of 75 in the NAPLEX, such applicant, in order to be licensed, must [~~shall~~] retake the NAPLEX, as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum average grade of 75 is achieved.

(5) To pass the Texas Pharmacy Jurisprudence Examination, an applicant must [~~shall~~] make a minimum grade of 75. Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, must [~~shall~~] retake the Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title until such time as a minimum average grade of 75 is achieved.

(6) If the applicant should fail one of the examinations, the grade of the examination which the applicant initially passed may be used for the purpose of licensure by examination for a period of two years from the date of passing the initial examination.

(7) Examination applications and fees as specified in §283.9(a) of this title (relating to Fee Requirements for Licensure by Examination, Score Transfer and Reciprocity) must [~~shall~~] be received in the board office no later than six weeks prior to the examination date.

(8) Each applicant for licensure by examination utilizing NAPLEX scores transferred from another state must [~~shall~~] meet the following requirements for licensure in addition to the requirements set out in paragraphs (1) - (7) of this section.

(A) The applicant must [~~shall~~] request NABP to transfer NAPLEX scores to the board. Such request must [~~shall~~] be in accordance with NABP policy.

(B) The applicant must [~~shall~~] pay the fee set out in §283.9 of this title.

(9) The NAPLEX and Texas Pharmacy Jurisprudence Examination will [~~shall~~] be administered in compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.) and in accordance with NABP policy.

§283.8. Reciprocity Requirements.

(a) All applicants for licensure by reciprocity must:

(1) [~~shall~~] meet the educational and age requirements specified in §283.3 of this title (relating to Educational and Age Requirements);

(2) [~~may be required to~~] meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs;

(3) [~~shall~~] complete the Texas and NABP applications for reciprocity. (Any fraudulent statement made in the application for reciprocity is grounds for denial of the application; if such application is granted, any fraudulent statement is grounds for suspension, revocation, and/or cancellation of any license so granted by the board). The Texas application includes the following information: [~~;~~]

(A) name;

(B) addresses, phone numbers, date of birth, and social security number; and

(C) any other information requested on the application.

(D) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(4) must [~~shall~~] present to the board proof of initial licensing by examination and proof that their current license and any other license or licenses granted to the applicant by any other state have not been suspended, revoked, canceled, surrendered, or otherwise restricted for any reason; and

(5) must [~~shall~~] pass the Texas Pharmacy Jurisprudence Examination with a minimum grade of 75. (The passing grade may be used for the purpose of licensure by reciprocity for a period of two years from the date of passing the examination.) Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, must [~~shall~~] retake the Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum grade of 75 is achieved.

(b) A reciprocity applicant originally licensed after January 1, 1978, and who has graduated and received a professional degree from a college of pharmacy whose professional degree program has been approved by ACPE and approved by the board, must [~~shall~~] show proof such applicant has:

(1) passed the NAPLEX or equivalent examination based on criteria no less stringent than the criteria in force in Texas; or

(2) been continually engaged in the practice of pharmacy for a period of two years immediately preceding the application for reciprocal licensure and has obtained sufficient continuing education credits required to maintain a license to practice pharmacy in the state that originally licensed such pharmacist; or

(3) been licensed to practice pharmacy for a period of two years immediately preceding the application for reciprocal licensure and has obtained sufficient continuing education credits required to maintain a license to practice pharmacy in the state that originally licensed such pharmacist.

(c) A reciprocity applicant who is a foreign pharmacy graduate must [~~shall~~] provide written documentation that such applicant has:

(1) obtained full certification from the FPGEC; and

(2) passed NAPLEX or equivalent examination based on criteria no less stringent than the criteria in force in Texas.

(d) If a reciprocity applicant should fail the Texas Pharmacy Jurisprudence Examination, written notification of intent to retake the exam must [~~shall~~] be received in the board office no later than three weeks prior to the examination date.

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007043
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8028

♦ ♦ ♦

CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §§291.1, 291.3, 291.11, 291.16, 291.17

The Texas State Board of Pharmacy proposes amendments to §291.1, concerning Pharmacy License Application, §291.3, concerning Required Notifications, §291.11, concerning Operation of a Pharmacy, and §291.17, concerning Inventory requirements, and new §291.16, concerning Samples. The proposed amendments to §291.1, if adopted, clarify application requirements for pharmacies; and change the word shall to the word must. The proposed amendments to §291.3 and §291.11, if adopted, change the definition regarding the length of time a pharmacy could discontinue operating as a pharmacy, without notifying the Board that the pharmacy is closed. The amendments to §291.17, if adopted, add Class F pharmacy to the inventory requirements for pharmacies, removes references to carisoprodol, removes references to products no longer available, and clarifies the requirements by changing the word shall to must. New §291.16, if adopted, places the requirements for samples in Subchapter A, All Classes of Pharmacies.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will ensure that pharmacies provide appropriate information on applications; pharmacies no longer operating have a license for a pharmacy after 30 days; and Class F pharmacies perform required inventories. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments and new rule may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments and new rule are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments and new rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.1. Pharmacy License Application.

(a) To qualify for a pharmacy license, the applicant must submit an application including the following information:

(1) name and address of pharmacy;

(2) type of ownership;

(3) names, addresses, phone numbers, dates of birth, and social security numbers [~~home addresses, dates of birth, phone numbers, and social security numbers~~] of all owners; if a partnership or corporation, the name, title, addresses, phone numbers, dates of birth, and social security numbers [~~home address, home phone number, date of birth, and social security number~~] of all managing officers. Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis. [~~:~~]

(4) name and license number of the pharmacist-in-charge and of other pharmacists employed by the pharmacy;

(5) anticipated date of opening and hours of operation;

(6) copy of lease agreement or if the location of the pharmacy is owned by the applicant, a notarized statement certifying such location ownership;

(7) the signature of the pharmacist-in-charge;

(8) the notarized signature of the owner, or if the pharmacy is owned by a partnership or corporation, the notarized signature of an owner or managing officer;

(9) federal tax ID number of the owner;

(10) description of business services that will be offered;

(11) name and address of malpractice insurance carrier or statement that the business will be self-insured;

(12) the certificate of authority, if applicant is an out-of-state corporation;

(13) the articles of incorporation, if the applicant is a corporation;

(14) a current Texas Franchise Tax Certificate of Good Standing; and

(15) any other information requested on the application.

(b) Subsection (c) of this section applies to new pharmacy applications for Class A (Community), [~~pharmacies or~~] Class C (Institutional), or Class F (Freestanding Emergency Medical Care Center) pharmacies owned by a management company with the following exceptions.

(1) Subsection (c) of this section does not apply to a new pharmacy application submitted by an entity which already owns a pharmacy licensed in Texas.

(2) Subsection (c)(1) and (3) of this section do not apply to each individual owner or managing officer listed on a new pharmacy application if the individual possesses an active pharmacist license in Texas.

(c) If the pharmacy is to be licensed as a Class A (Community), [~~pharmacy or as a~~] Class C (Institutional), or Class F (Freestanding Emergency Medical Care Center) pharmacy owned by a management company, the applicant must submit copies of the following documents in addition to the information required in subsection (a) of this section:

(1) the birth certificate or passport of each individual owner, or, if the pharmacy is owned by a partnership or a closely held corporation:

(A) one of these documents for each managing officer; and

(B) a list of all owners of the corporation;

(2) an approved credit application from a primary wholesaler or other documents showing credit worthiness as approved by the Board; and

(3) a current driver license or state issued photo ID card of each individual owner, or, if the pharmacy is owned by a partnership or a closely held corporation, a current driver license or state issued photo ID card for each managing officer.

(d) - (f) (No change.)

(g) Prior to the issuance of a license for a pharmacy located in Texas, the board must [~~shall~~] conduct an on-site inspection of the pharmacy in the presence of the pharmacist-in-charge and owner or representative of the owner, to ensure that the pharmacist-in-charge and owner can meet the requirements of the Texas Pharmacy Act and Board Rules.

(h) (No change.)

§291.3. Required Notifications.

(a) Change of Location and/or Name.

(1) (No change.)

(2) At least 14 days prior to the change of location of a pharmacy that dispenses prescription drug orders, the pharmacist-in-charge must [~~shall~~] post a sign in a conspicuous place indicating that the pharmacy is changing locations. Such sign must [~~shall~~] be in the front of the prescription department and at all public entrance doors to the pharmacy and must [~~shall~~] indicate the date the pharmacy is changing locations.

(3) Disasters, accidents, and emergencies which require the pharmacy to change location must [~~shall~~] be immediately reported to the board. If a pharmacy changes location suddenly due to disasters, accidents, or other emergency circumstances and the pharmacist-in-charge cannot provide notification 14 days prior to the change of location, the pharmacist-in-charge must [~~shall~~] comply with the provisions of paragraph (2) of this subsection as far in advance of the change of location as allowed by the circumstances.

(b) Change of Managing Officers.

(1) The owner of a pharmacy must [~~shall~~] notify the board in writing within 10 days of a change of any managing officer of a partnership or corporation which owns a pharmacy. The written notification must [~~shall~~] include the effective date of such change and the following information for all managing officers:

(A) name and title;

(B) home address and telephone number;

(C) date of birth; and

(D) social security number.

(2) (No change.)

(c) Change of Ownership.

(1) When a pharmacy changes ownership, a new/completed pharmacy application must be filed with the board and the licensed issued to previous owner must [~~shall~~] be returned to the board.

(2) The new application must [~~shall~~] include the following information:

(A) the name and address of pharmacy;

(B) the type of ownership;

(C) the names, home addresses, dates of birth, phone numbers, and social security numbers of all owners; if a partnership or corporation, the name, title, home address, home phone number, date of birth, and social security number of all managing officers;

(D) the name and license number of the pharmacist-in-charge and of other pharmacists employed by the pharmacy;

(E) a copy of lease agreement or if the location of the pharmacy is owned by the applicant, a notarized statement certifying such location ownership;

(F) a copy of the purchase contract or mutual agreement between the buyer and seller, or a notarized statement of intent to convey ownership signed by both the buyer and seller, stating the proposed date of ownership change;

(G) the signature of the pharmacist-in-charge;

(H) the notarized signature of the owner, or if the pharmacy is owned by a partnership or corporation, the notarized signature of an owner or managing officer;

(I) federal tax ID number;

(J) description of business services that will be offered;

(K) name and address of malpractice insurance carrier or statement that the business will be self-insured;

(L) the certificate of authority, if applicant is an out-of-state corporation;

(M) the articles of incorporation, if the applicant is a corporation;

(N) a current Texas Franchise Tax Certificate of Good Standing; and

(O) any other information requested on the application.

(3) - (5) (No change.)

(d) Change of Pharmacist Employment.

(1) Change of pharmacist employed in a pharmacy. When a change in pharmacist employment occurs, the pharmacist must [~~shall~~] report such change in writing to the board within 10 days. The pharmacist-in-charge must [~~shall~~] delete or enter the name of the pharmacist changing employment on the license of such pharmacy.

(2) Change of pharmacist-in-charge of a pharmacy.

(A) On the date of change of the pharmacist-in-charge of a Class A (community), [~~or~~] Class C (institutional), or Class F (Freestanding Emergency Medical Care Center) pharmacy, an inventory specified in §291.17 of this title (relating to Inventory Requirements) must be taken. [~~of the following shall be taken:~~]

~~*[(i)* all Schedule II controlled substances;]~~

~~*[(ii)* all dosage forms containing pentazocine (e.g., Talwin);]~~

~~*[(iii)* all dosage forms containing phentermine (e.g., Ionamin, Fastin, Adipex-P, etc.);]~~

~~*[(iv)* all dosage forms containing diazepam (e.g., Valium);]~~

~~*[(v)* all dosage forms containing phendimetrazine (e.g., Bontril, Plegine, Prelu-2, etc.);]~~

~~*[(vi)* all dosage forms containing codeine;]~~

~~*[(vii)* all dosage forms containing hydrocodone (e.g., Tussionex, Tussend, Vicodin, Hycomine, etc.);]~~

~~*[(viii)* all dosage forms containing alprazolam (e.g., Xanax);]~~

~~*[(ix)* all dosage forms containing triazolam (e.g., Halcion);]~~

~~*[(x)* all dosage forms containing butorphanol (e.g., Stadol);]~~

~~*[(xi)* all dosage forms containing nalbuphine (e.g., Nubain); and]~~

~~*[(xii)* all dosage forms containing carisoprodol (e.g., Soma).]~~

(B) This inventory must [~~shall~~] constitute, for the purpose of this section, the closing inventory of the departing pharmacist-in-charge and the beginning inventory of the incoming pharmacist-in-charge.

(C) If the departing and the incoming pharmacists-in-charge are unable to conduct the inventory together, a closing inventory must [~~shall~~] be conducted by the departing pharmacist-in-charge and a new and separate beginning inventory must [~~shall~~] be conducted by the incoming pharmacist-in-charge.

(D) The incoming pharmacist-in-charge is [~~shall be~~] responsible for the following actions:

(i) deleting the name of the departing pharmacist-in-charge on the pharmacy license;

(ii) entering the name of the incoming pharmacist-in-charge on the pharmacy license;

(iii) notifying the board within 10 days in writing on a form provided by the board, that a change of pharmacist-in-charge has occurred. The notification must [~~shall~~] include the following:

(I) the name and license number of the departing pharmacist-in-charge;

(II) the name and license number of the incoming pharmacist-in-charge;

(III) the date the incoming pharmacist-in-charge became the pharmacist-in-charge; and

(IV) a statement signed by the incoming pharmacist-in-charge attesting that:

(-a-) an inventory has been conducted by the departing and incoming pharmacists-in-charge; if the inventory was not taken by both pharmacists, the statement must [~~shall~~] provide an explanation; and

(-b-) the incoming pharmacist-in-charge has read and understands the laws and rules relating to this class of pharmacy.

(e) Notification of Theft or Loss of a Controlled Substance or a Dangerous Drug.

(1) Controlled substances. For the purposes of the Act, §562.106, the theft or significant loss of any controlled substance by a pharmacy must [~~shall~~] be reported in writing to the board immediately on discovery of such theft or loss. A pharmacy is [~~shall be~~] in compliance with this subsection by submitting to the board a copy of the Drug Enforcement Administration (DEA) report of theft or loss of controlled substances, DEA Form 106, or by submitting a list of all controlled substances stolen or lost.

(2) Dangerous drugs. A pharmacy must [~~shall~~] report in writing to the board immediately on discovery the theft or significant loss of any dangerous drug by submitting a list of the name and quantity of all dangerous drugs stolen or lost.

(f) Fire or Other Disaster. If a pharmacy experiences a fire or other disaster, the following requirements are applicable.

(1) Responsibilities of the pharmacist-in-charge.

(A) The pharmacist-in-charge must [~~shall~~] be responsible for reporting the date of the fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or the treatment of the injury, illness, and disease; such notification must [~~shall~~] be immediately reported to the board, but in no event [~~shall~~] exceed 10 days from the date of the disaster.

(B) The pharmacist-in-charge or designated agent must [~~shall~~] comply with the following procedures.

(i) If controlled substances, dangerous drugs, or Drug Enforcement Administration (DEA) order forms are lost or destroyed in the disaster, the pharmacy must [~~shall~~]:

(I) notify the DEA, Department of Public Safety (DPS), and Texas State Board of Pharmacy (board) of the loss of the controlled substances or order forms. A pharmacy is [~~shall be~~] in compliance with this section by submitting to each of these agencies a copy of the DEA's report of theft or loss of controlled substances, DEA Form-106, immediately on discovery of the loss; and

(II) notify the Texas State Board of Pharmacy in writing of the loss of the dangerous drugs by submitting a list of the dangerous drugs lost.

(ii) If the extent of the loss of controlled substances or dangerous drugs is not able to be determined, the pharmacy must [~~shall~~]:

(I) take a new, complete inventory of all remaining drugs specified in §291.17(c) of this title (relating to Inventory Requirements);

(II) submit to DEA and DPS a statement attesting that the loss of controlled substances is indeterminable and that a new, complete inventory of all remaining controlled substances was conducted and state the date of such inventory; and

(III) submit to the board a statement attesting that the loss of controlled substances and dangerous drugs is indeterminable and that a new, complete inventory of the drugs specified in §291.17(c) of this title was conducted and state the date of such inventory.

(C) If the pharmacy changes to a new, permanent location, the pharmacist-in-charge must [~~shall~~] comply with subsection (a) of this section.

(D) If the pharmacy moves to a temporary location, the pharmacist must [~~shall~~] comply with subsection (a) of this section. If the pharmacy returns to the original location, the pharmacist-in-charge must [~~shall~~] again comply with subsection (a) of this section.

(E) If the pharmacy closes due to fire or other disaster, the pharmacy may not be closed for longer than 90 days as specified in §291.11 of this title (relating to Operating a Pharmacy).

(F) [~~(E)~~] If the pharmacy discontinues business (ceases to operate as a pharmacy), the pharmacist-in-charge must [~~shall~~] comply with §291.5 of this title (relating to Closed Pharmacies).

(G) [~~(F)~~] The pharmacist-in-charge must [~~shall~~] maintain copies of all inventories, reports, or notifications required by this section for a period of two years.

(2) Drug stock.

(A) Any drug which has been exposed to excessive heat, smoke, or other conditions which may have caused deterioration must [~~shall~~] not be dispensed.

(B) Any potentially adulterated or damaged drug must [~~shall~~] only be sold, transferred, or otherwise distributed pursuant to the provisions of the Texas Food Drug and Cosmetics Act (Chapter 431, Health and Safety Code) administered by the Bureau of Food and Drug Safety of the Texas Department of State Health Services.

(g) Notification to Consumers.

(1) Pharmacy.

(A) Every licensed pharmacy must [~~shall~~] provide notification to consumers of the name, mailing address, Internet site address, and telephone number of the board for the purpose of directing complaints concerning the practice of pharmacy to the board. Such notification must [~~shall~~] be provided as follows.

(i) If the pharmacy serves walk-in customers, the pharmacy must [~~shall~~] either:

(I) post in a prominent place that is in clear public view where prescription drugs are dispensed a sign furnished by the board which notifies the consumer that complaints concerning the practice of pharmacy may be filed with the board and list the board's name, mailing address, Internet site address, telephone number of the board, and if applicable a toll-free telephone number for filing complaints; or

(II) provide with each dispensed prescription a written notification in a type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number of the board, and if applicable a toll-free telephone number for filing complaints)."

(ii) If the prescription drug order is delivered to patients at their residence or other designated location, the pharmacy must [~~shall~~] provide with each dispensed prescription a written notification in type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number of the board, and if applicable a toll-free telephone number for filing complaints)." If multiple prescriptions are delivered to the same location, only one such notice is [~~shall be~~] required.

(iii) The provisions of this subsection do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(B) A pharmacy that maintains a generally accessible site on the Internet that is located in Texas or sells or distributes drugs through this site to residents of this state must [~~shall~~] post the following information on the pharmacy's initial home page and on the page where a sale of prescription drugs occurs.

(i) Information on the ownership of the pharmacy, to include at a minimum, the:

(I) owner's name or if the owner is a partnership or corporation, the partnership's or corporation's name and the name of the chief operating officer;

(II) owner's address;

(III) owner's telephone number; and

(IV) year the owner began operating pharmacies in the United States.

(ii) The Internet address and toll free telephone number that a consumer may use to:

(I) report medication/device problems to the pharmacy; and

(II) report business compliance problems.

(iii) Information about each pharmacy that dispenses prescriptions for this site, to include at a minimum, the:

(I) pharmacy's name, address, and telephone number;

(II) name of the pharmacist responsible for operation of the pharmacy;

(III) Texas pharmacy license number for the pharmacy and a link to the Internet site maintained by the Texas State Board of Pharmacy; and

(IV) the names of all other states in which the pharmacy is licensed, the license number in that state, and a link to the Internet site of the entity that regulates pharmacies in that state, if available.

(C) A pharmacy whose Internet site has been awarded a Verified Internet Pharmacy Practice Site (VIPPS) certification by the National Association of Boards of Pharmacy is [~~shall be~~] in compliance with subparagraph (B) of this paragraph by displaying the VIPPS seal on the pharmacy internet site.

(2) Texas State Board of Pharmacy. On or before January 1, 2005, the board must [~~shall~~] establish a pharmacy profile system as specified in §2054.2606, Government Code.

(A) The board must [~~shall~~] make the pharmacy profiles available to the public on the agency's Internet site.

(B) A pharmacy profile must [~~shall~~] contain at least the following information:

(i) name, address, and telephone number of the pharmacy;

(ii) pharmacy license number, licensure status, and expiration date of the license;

(iii) the class and type of the pharmacy;

(iv) ownership information for the pharmacy;

(v) names and license numbers of all pharmacists working at the pharmacy;

(vi) whether the pharmacy has had prior disciplinary action by the board;

(vii) whether the pharmacy's consumer service areas are accessible to disabled persons, as defined by law;

(viii) the type of language translating services, including translating services for persons with impairment of hearing, that the pharmacy provides for consumers; and

(ix) insurance information including whether the pharmacy participates in the state Medicaid program.

(C) The board must [~~shall~~] gather this information on initial licensing and update the information in conjunction with the license renewal for the pharmacy.

(h) Notification of Licensees or Registrants Obtaining Controlled Substances or Dangerous Drugs by Forged Prescriptions. If a licensee or registrant obtains controlled substances or dangerous drugs from a pharmacy by means of a forged prescription, the pharmacy must [~~shall~~] report in writing to the board immediately on discovery of such forgery. A pharmacy must [~~shall~~] be in compliance with this subsection by submitting to the board the following:

(1) name of licensee or registrant obtaining controlled substances or dangerous drugs by forged prescription;

(2) date(s) of forged prescription(s);

(3) name(s) and amount(s) of drug(s); and

(4) copies of forged prescriptions.

§291.11. Operation of a Pharmacy.

(a) For the purposes of §565.002(7) of the Texas Pharmacy Act, the following words and terms are [~~shall be~~] defined as follows.

(1) "Failure to engage in the business described in the application for a license" means the holder of a pharmacy license has not commenced operating the pharmacy within six months of the date of issuance of the license.

(2) "Ceased to engage in the business described in the application for a license" means the holder of a pharmacy license, once it has been in operation, discontinues operating the pharmacy for a period of 30 days [~~six months~~] or longer unless the pharmacy experiences a fire or disaster, in which case the pharmacy must comply with §291.3(f) of this title (relating to Notifications).

(b) For the purposes of this section, the term "operating the pharmacy" means the pharmacy must [~~shall~~] demonstrate observable pharmacy business activity on a regular, routine basis, including a sufficient number of transactions of receiving, processing, or dispensing prescription drug orders or medication drug orders.

(c) No person may operate a pharmacy in a personal residence.

§291.16. Samples.

Unless otherwise specified, a pharmacy may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(1) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(2) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(3) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(4) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1987.

§291.17. Inventory Requirements.

(a) General requirements.

(1) The pharmacist-in-charge must [~~shall~~] be responsible for taking all required inventories, but may delegate the performance of the inventory to another person(s).

(2) The inventory must [~~shall~~] be maintained in a written, typewritten, or printed form. An inventory taken by use of an oral recording device must be promptly transcribed.

(3) The inventory must [~~shall~~] be kept in the pharmacy and must [~~shall~~] be available for inspection for two years.

(4) The inventory must [~~shall~~] be filed separately from all other records.

(5) The inventory must [~~shall~~] be in a written, typewritten, or printed form and include all stocks of the following drugs on hand on the date of the inventory (including any which are out-of-date):

(A) all controlled substances; and

(B) all dosage forms containing nalbuphine (e.g., Nubain). [~~; and~~]

[~~(C) all dosage forms containing carisoprodol (e.g., Soma).~~]

(6) The inventory may be taken either as of the opening of business or as of the close of business on the inventory date.

(7) The inventory record must [~~shall~~] indicate whether the inventory is taken as of the opening of business or as of the close of business on the inventory date. If the pharmacy is open 24 hours a day, the opening of business must [~~shall~~] be 12:01 a.m. and the close of business must [~~shall~~] be 12 midnight. The inventory must [~~shall~~] indicate that it is a record of drugs on-hand as of the opening or closing of the business day.

(8) The person(s) taking the inventory and the pharmacist-in-charge must [~~shall~~] indicate the time the inventory was taken (as specified in paragraph (7) of this subsection) and must [~~shall~~] sign and date the inventory with the date the inventory was taken. The signature of the pharmacist-in-charge and the date of the inventory must [~~shall~~] be notarized within 72 hours or three working days of the completed initial, annual, change of ownership, and closing inventory.

(9) The person(s) taking the inventory must [~~shall~~] make an exact count or measure of all substances listed in Schedule I or II.

(10) The person(s) taking the inventory must [~~shall~~] make an estimated count or measure of all substances listed in Schedule III, IV, or V and dangerous drugs, unless the container holds more than 1,000 tablets or capsules in which case, an exact count of the contents must be made.

(11) The inventory of Schedule I and II controlled substances must [~~shall~~] be listed separately from the inventory of Schedule III, IV, and V controlled substances which must [~~shall~~] be listed separately from the inventory of dangerous drugs.

(12) If the pharmacy maintains a perpetual inventory of any of the drugs required to be inventoried, the perpetual inventory must [~~shall~~] be reconciled on the date of the inventory.

(b) Initial inventory.

(1) A new Class A (community) pharmacy, [~~or~~] Class C (institutional) pharmacy, or Class F (free standing emergency medical care center) pharmacy must [~~shall~~] take an inventory on the opening day of business. Such inventory must [~~shall~~] include all stocks (including any out-of-date drugs) of the following:

(A) all controlled substances; and

(B) all dosage forms containing nalbuphine (e.g., Nubain). [~~; and~~]

[~~(C) all dosage forms containing carisoprodol (e.g., Soma).~~]

(2) In the event the Class A, [~~or~~] C, or F pharmacy commences business with none of the drugs specified in paragraph (1) of this subsection on hand, the pharmacy must [~~shall~~] record this fact as the initial inventory.

(3) The initial inventory must [~~shall~~] serve as the pharmacy's inventory until the next May 1, or until the pharmacy's regular general physical inventory date, at which time the Class A, [~~or~~] C, or F pharmacy must [~~shall~~] take an annual inventory as specified in subsection (c) of this section. Such inventory may be taken within four days of the specified inventory date and must [~~shall~~] include all stocks (including out-of-date drugs).

(c) Annual inventory.

(1) A Class A, [~~or~~] C, or F pharmacy must [~~shall~~] take an inventory on May 1 of each year, or on the pharmacy's regular general physical inventory date. Such inventory may be taken within four days of the specified inventory date and must [~~shall~~] include all stocks (including out-of-date drugs) of the following:

(A) all controlled substances; and

(B) all dosage forms containing nalbuphine (e.g., Nubain). [~~; and~~]

[~~(C) all dosage forms containing carisoprodol (e.g., Soma).~~]

(2) A Class A, [~~or~~] C, or F pharmacy applying for renewal of a pharmacy license must [~~shall~~] include as a part of the pharmacy license renewal application a statement attesting that an annual inventory has been conducted, the date of the inventory, and the name of the person taking the inventory.

(d) Change of ownership.

(1) A Class A, [~~or~~] C, or F pharmacy that changes ownership must [~~shall~~] take an inventory of all of the following drugs on hand (including any which are out-of-date) on the date of change of ownership:

(A) all controlled substances; and

(B) all dosage forms containing nalbuphine (e.g., Nubain). [~~; and~~]

[~~(C) all dosage forms containing carisoprodol (e.g., Soma).~~]

(2) Such inventory must [~~shall~~] constitute, for the purpose of this section, the closing inventory for the seller and the initial inventory for the buyer.

(3) Transfer of any controlled substances listed in Schedule I or II must [~~shall~~] require the use of official DEA order forms (Form 222C).

(e) Closed pharmacies. The pharmacist-in-charge of a Class A, [~~or~~] C, or F pharmacy that ceases to operate as a pharmacy must [~~shall~~] forward to the board, within 10 days of the cessation of operation, a statement attesting that an inventory of the drugs specified in subsection (c) of this section on hand has been conducted, the date of closing, and a statement attesting the manner by which the dangerous drugs and controlled substances possessed by such pharmacy were transferred or disposed.

(f) Requirements for Class C (Institutional) pharmacies.

(1) Perpetual inventory.

(A) A Class C pharmacy must [~~shall~~] maintain a perpetual inventory of all Schedule II controlled substances.

(B) The perpetual inventory must [~~shall~~] be reconciled on the date of the annual inventory.

(2) Annual inventory.

(A) An inventory must [~~shall~~] be conducted on May 1 of each year, or on the pharmacy's regular general physical inventory date. Such inventory may be taken within four days of the specified inventory date and must [~~shall~~] be in a written, typewritten, or printed form and include all stocks (including out-of-date drugs) of the following:

(i) all controlled substances; and

(ii) all dosage forms containing nalbuphine (e.g., Nubain). [~~; and~~]

[~~*(iii)* all dosage forms containing carisoprodol (e.g., Soma).~~]

(B) The annual inventory of the institution must [~~shall~~] include all of the drugs specified in subparagraph (A) of this paragraph on hand in the pharmacy.

(C) The inventory of the institution must [~~shall~~] be maintained in the pharmacy; if an inventory is conducted in other departments within the institution, the inventory of the pharmacy must [~~shall~~] be listed separately, as follows:

(i) the inventory of drugs on hand in the pharmacy must [~~shall~~] be listed separately from the inventory of drugs on hand in the other areas of the institution; and

(ii) the inventory of drugs on hand in all other departments must [~~shall~~] be identified by department.

(g) Change of pharmacist-in-charge of a pharmacy.

(1) On the date of change of the pharmacist-in-charge of a Class A (community), [~~or~~] Class C (institutional) pharmacy, or Class F (free standing emergency medical care center) pharmacy, an inventory of the following drugs must [~~shall~~] be taken:

(A) all Schedule II controlled substances;

(B) all dosage forms containing pentazocine (e.g., Talwin);

(C) all dosage forms containing phentermine (e.g., [~~Ionamin, Fastin,~~] Adipex-P, etc.);

(D) all dosage forms containing diazepam (e.g., Valium);

(E) all dosage forms containing phendimetrazine (e.g., Bontril, [~~Plegine,~~] Prelu-2, etc.);

(F) all dosage forms containing codeine;

(G) all dosage forms containing hydrocodone (e.g., Tussionex, Tussend, Vicodin, [~~Hycomine,~~] etc.);

(H) all dosage forms containing alprazolam (e.g., Xanax);

(I) all dosage forms containing triazolam (e.g., Halcion);

(J) all dosage forms containing butorphanol (e.g., Stadol);

(K) all dosage forms containing nalbuphine (e.g., Nubain); and

(L) all dosage forms containing carisoprodol (e.g., Soma).

(2) This inventory must [~~shall~~] constitute, for the purpose of this section, the closing inventory of the departing pharmacist-in-charge and the beginning inventory of the incoming pharmacist-in-charge.

(3) If the departing and the incoming pharmacists-in-charge are unable to conduct the inventory together, a closing inventory must [~~shall~~] be conducted by the departing pharmacist-in-charge and a new and separate beginning inventory must [~~shall~~] be conducted by the incoming pharmacist-in-charge.

(4) The incoming pharmacist-in-charge must [~~shall~~] be responsible for [~~the following actions:~~]

[~~(A) deleting the name of the departing pharmacist-in-charge on the pharmacy license;~~]

[~~(B) entering the name of the incoming pharmacist-in-charge on the pharmacy license;~~]

[~~(C)~~] notifying the board within 10 days in writing on a form provided by the board, that a change of pharmacist-in-charge has occurred. The notification must [~~shall~~] include the following:

(A) [~~(i)~~] the name and license number of the departing pharmacist-in-charge;

(B) [~~(ii)~~] the name and license number of the incoming pharmacist-in-charge;

(C) [~~(iii)~~] the date the incoming pharmacist-in-charge became the pharmacist-in-charge; and

(D) [~~(iv)~~] a statement signed by the incoming pharmacist-in-charge attesting that:

(i) [~~(I)~~] an inventory has been conducted by the departing and incoming pharmacists-in-charge; if the inventory was not taken by both pharmacists, the statement must [~~shall~~] provide an explanation; and

(ii) [~~(II)~~] the incoming pharmacist-in-charge has read and understands the laws and rules relating to this class of pharmacy.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007051

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.32, §291.33

The Texas State Board of Pharmacy proposes amendments to §291.32, concerning Personnel, and §291.33, concerning Operational Standards. The proposed amendments to §291.32, if adopted, specify the duties that may be performed by pharmacy technicians and clarify duties that may not be performed other individuals. The proposed amendments to §291.33, if adopted, remove the requirements regarding samples from the Class A rules and move the requirements to new §291.16 under All Classes of Pharmacy published elsewhere in this issue of the *Texas Register.*

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that only individuals licensed or registered with the Board are performing certain duties in the pharmacy; and ensure that the rules regarding samples are consistent for each class of pharmacy. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §§551.002, 554.051, and 568.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §568.001 as authorizing the agency to adopt rules allowing pharmacy technicians to perform only nonjudgmental technical duties under the direct supervision of a pharmacist.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.32. Personnel.

(a) - (c) (No change.)

(d) Pharmacy Technicians and Pharmacy Technician Trainees.

(1) (No change.)

(2) Duties.

(A) Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in subsection (c)(2) of this section.

(B) A pharmacist may delegate to pharmacy technicians and pharmacy technician trainees any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(i) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees;

(ii) pharmacy technicians and pharmacy technician trainees are under the direct supervision of and responsible to a pharmacist; and

(iii) only pharmacy technicians and pharmacy technician trainees who have been properly trained on the use of an automated pharmacy dispensing system and can demonstrate comprehensive knowledge of the written policies and procedures for the operation of the system may be allowed access to the system; and

(C) Pharmacy technicians and pharmacy technician trainees may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs, as follows:

(i) initiating and receiving refill authorization requests;

(ii) entering prescription data into a data processing system;

(iii) taking a stock bottle from the shelf for a prescription;

(iv) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(v) affixing prescription labels and auxiliary labels to the prescription container;

(vi) reconstituting medications;

(vii) prepackaging and labeling prepackaged drugs;

(viii) loading bulk unlabeled drugs into an automated dispensing system provided a pharmacist verifies that the system is properly loaded prior to use;

(ix) compounding non-sterile and sterile prescription drug orders; [~~and~~]

(x) bulk compounding; [~~.~~]

(xi) stocking the prescription department with prescription drugs;

(xii) returning filled prescriptions not picked up by patient to shelves in the prescription department; and

(xiii) selling non-prescription insulin to a patient after verification by a pharmacist.

(D) Only individuals licensed or registered with the board may perform the duties specified in subparagraph (C) of this paragraph. Individuals not registered as pharmacy technicians or pharmacy technician trainees, licensed as pharmacists, or registered as pharmacist interns (e.g., clerks, cashiers, delivery personnel) may not perform the duties of a pharmacy technician or pharmacy technician trainee.

(3) (No change.)

(e) (No change.)

§291.33. Operational Standards.

(a) - (e) (No change.)

(f) Drugs.

(1) - (3) (No change.)

(4) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples). [~~all of the following conditions:~~]

[~~(A) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;~~]

[~~(B) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;~~]

[~~(C) the samples are for dispensing or provision at no charge to patients of such health care entity; and~~]

[~~(D) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.~~]

(g) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74, §291.76

The Texas State Board of Pharmacy proposes amendments to §291.74, concerning Operational Standards, and §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center. The proposed amendments, if adopted, remove the requirements regarding samples from the specific pharmacy classes and move the requirements to new §291.16 under All Classes of Pharmacy published elsewhere in this issue of the *Texas Register.*

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that the rules regarding samples are consistent for each class of pharmacy. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.74. Operational Standards.

(a) - (e) (No change.)

(f) Drugs.

(1) Procurement, preparation and storage.

(A) The pharmacist-in-charge has [~~shall have~~] the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(B) The pharmacist-in-charge has [~~shall have~~] the responsibility for determining specifications of all drugs procured by the facility.

(C) Institutional pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples). [~~all of the following conditions:~~]

~~*[(i)* the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;]~~

~~*[(ii)* the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;]~~

~~*[(iii)* the samples are for dispensing or provision at no charge to patients of such health care entity; and]~~

~~*[(iv)* the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.]~~

(D) All drugs must [~~shall~~] be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(E) Any drug bearing an expiration date may not be distributed beyond the expiration date of the drug.

(F) Outdated and other unusable drugs must [~~shall~~] be removed from stock and must [~~shall~~] be quarantined together until such drugs are disposed of properly.

(2) - (6) (No change.)

(g) - (j) (No change.)

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) - (c) (No change.)

(d) Operational standards.

(1) - (4) (No change.)

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge has [~~shall have~~] the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge has [~~shall have~~] the responsibility for determining specifications of all drugs procured by the facility.

(iii) ASC pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples). [~~all of the following conditions:~~]

~~*[(I)* the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;]~~

~~*[(II)* the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;]~~

~~*[(III)* the samples are for dispensing or provision at no charge to patients of such health care entity; and]~~

~~*[(IV)* the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.]~~

(iv) All drugs must [~~shall~~] be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs.)

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs must [~~shall~~] be removed from dispensing stock and must [~~shall~~] be quarantined together until such drugs are disposed of.

(B) - (C) (No change.)

(6) - (9) (No change.)

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. OTHER CLASSES OF PHARMACY

22 TAC §291.151

The Texas State Board of Pharmacy proposes amendments to §291.151, concerning Pharmacies Located in a Freestanding

Emergency Medical Care Center (Class F). The proposed amendments, if adopted, remove the requirements regarding samples from the specific pharmacy classes and move the requirements to new §291.16 under All Classes of Pharmacy published elsewhere in this issue of the *Texas Register.*

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that the rules regarding samples are consistent for each class of pharmacy. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.151. Pharmacies Located in a Freestanding Emergency Medical Care Center (Class F).

(a) - (c) (No change.)

(d) Operational standards.

(1) - (4) (No change.)

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge has [~~shall have~~] the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge has [~~shall have~~] the responsibility for determining specifications of all drugs procured by the facility.

(iii) FEMCC pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples). [~~all of the following conditions:~~]

~~*[(I)* the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;]~~

~~*[(II)* the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;]~~

~~*[(III)* the samples are for dispensing or provision at no charge to patients of such health care entity; and]~~

~~*[(IV)* the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.]~~

(iv) All drugs must [~~shall~~] be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs must [~~shall~~] be removed from dispensing stock and must [~~shall~~] be quarantined together until such drugs are disposed of.

(B) - (C) (No change.)

(6) - (9) (No change.)

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 295. PHARMACISTS

22 TAC §295.8

The Texas State Board of Pharmacy proposes amendments to §295.8, concerning Continuing Education Requirements. The proposed amendments, if adopted, clarify the requirements for continuing education during a licensee's initial licensure period.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that pharmacists receive adequate continuing education during each licensure period. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §§551.002, 554.051, and 559.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the

Act. The Board interprets §559.051 as authorizing the agency to adopt rules regarding continuing education requirements.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.8. Continuing Education Requirements.

(a) - (b) (No change.)

(c) Methods for obtaining continuing education. A pharmacist may satisfy the continuing education requirements by either:

(1) successfully completing the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section;

(2) successfully completing during the preceding license period, one credit hour for each year of their license period, which is a part of the professional degree program in a college of pharmacy the professional degree program of which has been accredited by ACPE; [~~or~~]

(3) taking and passing the standardized pharmacy examination (NAPLEX) during the preceding license period, which is [~~shall be~~] equivalent to the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section; or [~~.~~]

(4) having a Texas pharmacist license issued by examination or reciprocity within the previous thirty (30) months.

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.3

The Texas State Board of Pharmacy proposes amendments to §297.3, concerning Registration Requirements. The proposed amendments, if adopted, clarify application requirements for pharmacy technicians, and pharmacy technician trainees; and change the word shall to must.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that registrants provide appropriate information on applications. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§297.3. Registration Requirements.

(a) General.

(1) Individuals [~~Effective February 1, 2007, individuals~~] who are not registered with the Board may not be employed as or perform the duties of a pharmacy technician or pharmacy technician trainee.

(2) Individuals who have previously applied and registered as a pharmacy technician, regardless of the pharmacy technician's current registration status, may not register as a pharmacy technician trainee.

(3) Individuals who apply and are qualified for both a pharmacy technician trainee registration and a pharmacy technician registration concurrently will not be considered for a pharmacy technician trainee registration.

(b) Registration for pharmacy technician trainees. An individual may register as a pharmacy technician trainee only once and the registration may not be renewed.

(1) Each applicant for pharmacy technician trainee registration must:

(A) [~~shall~~] have a high school or equivalent diploma (e.g., GED), or be working to achieve a high school or equivalent diploma. For the purposes of this subparagraph, an applicant for registration may be working to achieve a high school or equivalent diploma for no more than two years;

(B) [~~shall~~] complete the Texas application for registration that includes the following information:[~~; and~~]

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application.

(iv) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(C) [~~may be required to~~] meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and paying the required fees.

(2) Once an applicant has successfully completed all requirements of registration, and the board has determined there are no grounds to refuse registration, the applicant will be notified of registration as a pharmacy technician trainee and of his or her pharmacy technician trainee registration number.

(3) Pharmacy technician trainee registrations expire two years from the date of registration or upon issuance of registration as a registered pharmacy technician, whichever is earlier.

(c) Initial registration for pharmacy technicians.

(1) Each applicant for pharmacy technician registration must [~~shall~~]:

(A) have a high school or equivalent diploma (e.g., GED), or be working to achieve a high school or equivalent diploma. For the purpose of this clause, an applicant for registration may be working to achieve a high school or equivalent diploma for no more than two years; and

(B) either have:

(i) taken and passed the Pharmacy Technician Certification Board's National Pharmacy Technician Certification Examination or other examination approved by the board and have a current certification certificate; or

(ii) been granted an exemption from certification by the board as specified in §297.7 of this title (relating to Exemption from Pharmacy Technician Certification Requirements); and

(C) complete the Texas application for registration that includes the following information:[~~;~~]

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application.

(iv) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(D) meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and paying the required fees; and

(E) pay the registration fee specified in §297.4 of this title (relating to Fees).

(2) New pharmacy technician registrations are [~~shall be~~] assigned an expiration date and the fee is [~~shall be~~] prorated based on the assigned expiration date.

(3) Once an applicant has successfully completed all requirements of registration, and the board has determined there are no grounds to refuse registration, the applicant will be notified of registration as a registered pharmacy technician and of his or her pharmacy technician registration number. If the pharmacy technician applicant was registered as a pharmacy technician trainee at the time the pharmacy technician registration issued, the pharmacy technician trainee registration expires.

(d) Renewal.

(1) All applicants for renewal of a pharmacy technician registration must [~~shall~~]:

(A) complete the Texas application for registration that includes the following information:[~~;~~]

(i) name;

(ii) addresses, phone numbers, date of birth, and social security number; and

(iii) any other information requested on the application.

(iv) Each applicant must submit the home address which will be considered the confidential address of record and an alternate address. If the applicant fails to provide an alternate address, the confidential address of record will be duplicated and considered to be the publicly available address. The alternate address must be a business address or other alternate address, such as the home address of a relative, where mail can be received on a regular basis.

(B) pay the renewal fee specified in §297.4 of this title; and

(C) complete 20 contact hours of continuing education per renewal period in as specified in §297.8 of this title (relating to Continuing Education).

(2) A pharmacy technician registration expires on the last day of the assigned expiration month.

(3) If the completed application and renewal fee are not received in the board's [~~boards~~] office on or before the last day of the assigned expiration month, the person's pharmacy technician registration will [~~shall~~] expire. A person must [~~shall~~] not practice as a pharmacy technician with an expired registration.

(4) If a pharmacy technician registration has expired, the person may renew the registration by paying to the board the renewal fee and a delinquent fee that is equal to the renewal fee as specified in §297.4 of this title.

(5) If a pharmacy technician registration has expired for more than one year, the pharmacy technician may not renew the registration and must complete the requirements for initial registration as specified in subsection (c) of this section.

(6) After review, the board may determine that paragraph (5) of this subsection does not apply if the registrant is the subject of a pending investigation or disciplinary action.

(e) An individual may use the title "Registered Pharmacy Technician" or "Ph.T.R." if the individual is registered as a pharmacy technician in this state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007059
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8028

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CHAPTER 311. CODE OF CONDUCT

22 TAC §311.1

The Texas State Board of Pharmacy proposes amendments to §311.1, concerning Procedures. The proposed amendments, if adopted, clarify the requirements for filing a complaint against a Board employee, including peace officers.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that complaints filed against Board staff are handled appropriately. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

The amendments are proposed under §§551.002, 554.051, and 556.056 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §559.051 as authorizing the agency to adopt rules regarding continuing education requirements. The Board interprets §556.056 as authorizing the agency to adopt a code of professional responsibility and to establish procedures for receiving and investigating a complaint of a code violation.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§311.1. Procedures.

(a) Complaints alleging violations of the Board Code of Conduct by a board employee must [~~shall~~] be submitted in writing to the executive director. If a board member is notified of a complaint against an employee, the board member must [~~shall~~] direct the complainant to file a written complaint with the executive director. Complaints filed against a peace officer employee must comply with §614.023 of the Government Code (relating to Copy of Complaint to be Given to Officer or Employee).

(b) The executive director must [~~shall~~] notify the employee's supervisor that a complaint has been filed against the employee. The supervisor must [~~shall~~] provide the employee with written notice that a complaint has been filed, which contains the date the complaint was filed and a description of the complaint. An anonymous complaint or a complaint filed by e-mail will not be considered a valid complaint for the purposes of this section.

(c) In order for a complaint concerning violations of the Code of Conduct to be considered valid, such complaint must [~~shall~~] contain the following information:

(1) the date the complaint is filed;

(2) the date the violation occurred;

(3) the complainant's name, address, and telephone number;

(4) the name of the board employee;

(5) detailed description of the alleged violation;

(6) any written documentation or name of witnesses to the alleged violation; and

(7) the signature of the complainant.

(d) The executive director must [~~shall~~] acknowledge receipt of the complaint in writing to the complainant. Such acknowledgment may include a request for additional information concerning the complaint or questions about the occurrence or statements.

(e) In reviewing the complaint, the executive director may contact the complainant if necessary and must [~~shall~~] conduct a personal interview with the employee and give the employee ample opportunity to present evidence to support his or her explanation of the circumstances surrounding the complaint. The employee must [~~shall~~] have the right to submit any relevant records, materials, comments, and documents to the executive director for review. Additionally, the employee has the right to review all documents and records involving the complaint. The employee may request the executive director to allow the board's legal counsel to advise the employee of his or her rights.

(f) Upon completing the review of the complaint and relevant statements or documents, the executive director must [~~shall~~] render a decision concerning the complaint within 10 days and provide written notification of the decision to the employee, and his or her supervisor within five days of rendering the decision. The executive director must [~~shall~~] notify the complainant of the disposition of the complaint. If the disposition of the complaint affects the employee's employment status, the employee has the right to exercise the board's grievance procedure.

(g) Complaints alleging violations of the Board Code of Conduct by the executive director must [~~shall~~] be directed to the president of the board. The procedures set out in this section must [~~shall~~] be followed in disposing of such complaints; provided, however, that for the purposes of this subsection, where the term "executive director" appears in the procedures set out in this section, the term "president of the board" must [~~shall~~] be substituted therefor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 305-8028

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PART 36. COUNCIL ON SEX OFFENDER TREATMENT

CHAPTER 810. COUNCIL ON SEX OFFENDER TREATMENT

The Council on Sex Offender Treatment (council) proposes amendments to §§810.1 - 810.5, 810.8, 810.9, 810.31 - 810.34, 810.61 - 810.68, 810.91, 810.92, 810.121, and 810.122, the

repeal of §§810.6, 810.151 - 810.153, 810.181 - 810.183, 810.211, 810.241, 810.242, and 810.271 - 810.275, and new §§810.151 - 810.153, 810.211, 810.241, 810.242, 810.271 - 810.273, 810.281 - 810.283, and 810.301 - 810.308, concerning the licensing of sex offender treatment providers, the civil commitment of sexually violent predators, and early termination for certain persons' obligation to register.

BACKGROUND AND PURPOSE

The new sections are due to the statutory changes made during the 79th Legislative Session, 2005, by the passage of House Bill (HB) and is codified in the Texas Occupations Code, Chapter 110. The legislation requires that the council by rule set licensure requirements and standards for those individuals who provide sex offender treatment in this state.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 810.1 - 810.6, 810.8, 810.9, 810.31 - 810.34, 810.61 - 810.68, 810.91, 810.92, 810.121, 810.122, 810.151 - 810.153, 810.181 - 810.183, 810.211, 810.241, 810.242, and 810.271 - 810.275 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. As a result of this four year review of agency rules, §§810.1 - 810.5, 810.8, 810.9, 810.31 - 810.34, 810.61 - 810.68, 810.91, 810.92, 810.121 and 810.122 are being amended, and §§810.6, 810.151 - 810.153, 810.181 - 810.183, 810.211, 810.241, 810.242, and 810.271 - 810.275 are being repealed, and replaced with new §§810.151 - 810.153, 810.211, 810.241, 810.242, 810.271 - 810.273, 810.281 - 810.285, and 810.301 - 810.308. The revisions will provide clarification to the rules and statutory changes.

SECTION BY SECTION SUMMARY

Section 810.1 provides a grammatical change. Section 810.2 adds new definitions for non-deceptive polygraph examination result, safety plan, and clarifies the definitions for polygraph examiner and successful completion of sex offender specific treatment. Section 810.3 deletes the four year exemption for licensure, clarifies licensure, adds new sections regarding criminal history, inactive status, and active military. Section 810.4 provides clarification to continuing education hours and timeframes. Section 810.5 provides licensing fees. Section 810.8 provides a grammatical change. Section 810.9 provides clarification regarding complaints, disciplinary actions, and administrative hearings and the timeframe in processing a complaint.

Sections 810.31, 810.32, and 810.34 provide grammatical changes. Section 810.33 provides for the destruction of adjudication information by the council and submission of fingerprints.

Section 810.61 provides a grammatical change. Section 810.62 provides clarification of the professional obligations required by licensees. Section 810.63 provides clarification of the professional and legal obligations required by licensees in the assessment of a sex offender or juvenile with sexual behavior problems. Section 810.64 provides clarification of the professional and legal obligations required by licensees in the assessment and treatment of adult sex offenders. Section 810.65 provides clarification of the professional and legal obligations required by licensees in the assessment of juveniles with sexual behavior problems. Section 810.66 provides clarification of the professional and legal obligations required by licensees regarding female sex offenders. Section 810.67 provides clarification of the professional and legal obligations required by licensees regarding the assessment and treatment of developmentally delayed clients. Section 810.68 provides grammatical changes and shall subscribe and adhere to various tenets as they relate to pertinent issues to be addressed in treatment.

Section 810.91 provides grammatical changes for licensees with general guidance regarding their ethical obligations. Section 810.92 adds that licensees may terminate services and facilitate a transfer of a client from treatment based on a complaint against the licensee concerning enforcement of the ethical obligations of all licensees. Also, licensees shall not contract or subcontract for work concerning client relationships. Information concerning confidentially of client records was revised.

Section 810.121 provides clarification regarding the history concerning the civil commitment. Section 810.122 provides for various definitional changes involving the civil commitment program. The definitions of child safety-zone, civil commitment, civil commitment treatment provider, global positioning satellite (GPS) tracking, penile plethysmograph (PPG), polygraph examination (Clinical), polygraph examiner, repeat sexually violent offender, residential facility, supervision, treatment, and GPS requirements have been deleted. The definitions of civil commitment case manager, predatory act, sexually violent offense, and sexually violent predator were amended.

New §810.151 provides the council with authority to employ program specialists to assist in the civil commitment program. New §810.152 provides that the case manager may be a recipient of information from the council relating to a sexually violent predator (SVP). New §810.153 provides clarification regarding standards of care provided to the SVP.

New §810.211 provides that a SVP shall receive a biennial examination and the requirements of the report.

New §810.241 and §810.242 provides for the case manager to authorize release and provide written notice to the SVP.

New §810.271 clarifies that the council shall provide all relevant information to the program specialist and/or case manager. New §810.272 provides duties and responsibilities of the council regarding the multidisciplinary team. New §810.273 clarifies the cost of the tracking service and transfer of money.

New §§810.281 - 810.283 clarify the authority of the council to obtain a criminal history on potential employees, access to the records, and destruction of the criminal history record.

New §810.301 clarifies the provisions and construction regarding deregistration of individuals on the public registry. New §810.302 adds new definitions concerning deregistration.

New §810.303 provides clarification regarding the council's responsibilities and guidelines regarding deregistration. New §810.304 and §810.305 provide clarification regarding the council's responsibility regarding the eligibility and evaluation criteria for deregistration. New §810.306 and §810.307 provide clarification regarding the evaluation specialist and the methodology regarding the evaluation. New §810.308 provides clarification regarding the evaluation protocol and quality assurance regarding the evaluation.

FISCAL NOTE

Allison Taylor, Executive Director, Council on Sex Offender Treatment, has determined that for each calendar year of the first-five years the sections will be in effect, there will be fiscal

implications to the state as a result of enforcing or administering the sections proposed. The effect on state government will be an increase in revenue to the state of $160,000 the first calendar year as a result of collecting initial deregistration and evaluation review fees set at total of $100 for approximately one-forth of the 64,000 registered sex offenders. There will be an increase in revenue during the third and fifth calendar year as the approximately 1200 registered sex offenders are added each year (approximately 300 registered sex offenders). The effect on state government will be an increase in revenue to the state of $30,000. It is estimated that the small specialty licensee population regarding deregistration approximately 10% (approximately 46 license holders) will increase revenue to the state of $1,720 the first calendar year as a result of collecting the specialty fee. There will be an increase in revenue during the third and fifth calendar year as approximately another 10% of license holders will obtain the specialty fee which will increase the revenue to the state of an additional $1,720.

Currently, there are 463 licensed sex offender treatment providers. The affect on state government will be an increase in revenue to the state of $34,725 the first and second calendar year as a result of collecting of biennial renewal licensure fees of $275. The affect on state government will be an increase in revenue to the state of $1,875 the first calendar year as a result of collecting five new application fee of $375. This increase in revenue is an estimate as there is no statistical data on the number of registered sex offenders who will apply for deregistration, new applicants, new specialty licenses, applicants for inactive status, or criminal history evaluation letters.

Implementation of the proposed sections may result in fiscal implementations for local and state governments. There may be fiscal implications for local and state governmental entities who currently utilize licensed providers. It is not possible to estimate how many providers employed through local or state governmental entities are affected or if the entity will choose to pay the licensing costs for the person. An affected person must meet the current licensure requirements (including possible additional education), pay a $375 initial licensure fee, meet continuing education requirements, and pay a $275 biennial renewal fee.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Taylor has also determined that there may be an effect on small businesses or micro-businesses that are required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses may be required to alter their business practices in order to comply with the sections. There is no anticipated negative impact on local employment. There are anticipated economic costs to individuals who are required to comply with the sections as proposed. The initial application cost to an individual is $375 for the biennium plus an additional $39 charge for the Department of Public Safety criminal history check and thereafter a $275 biennial licensing renewal cost.

PUBLIC BENEFIT

In addition, Ms. Taylor has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to ensure and enhance public safety.

PUBLIC COMMENT

Comments on the proposal may be submitted to Lupe Ruedas, Council on Sex Offender Treatment, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347, fax (512) 834-4511, or email to lupe.ruedas@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication of the proposed rules in the *Texas Register.* For additional information, please contact Lupe Ruedas at (512) 834-4530.

SUBCHAPTER A. LICENSED SEX OFFENDER TREATMENT PROVIDERS

22 TAC §§810.1 - 810.5, 810.8, 810.9

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The amendments affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.1. Introduction.

(a) - (b) (No change.)

(c) History. The Council on Sex Offender Treatment (council) was created by the 68th Legislature (Senate Bill 84) in 1983 under the name of the Interagency Council on Sex Offender Treatment and its [~~its'~~] Act is codified in Occupations Code, Chapter 110. The council was designed to coordinate effective assessment and treatment strategies to reduce recidivism of sex offenders and to enhance public safety.

§810.2. Definitions.

(a) (No change.)

(b) Treatment Definitions.

(1) Ability to Give Consent--As stated in Penal Code, §1.07, "assent in fact whether expressed or not," and as recognized under Family Code, §2.102 and §2.103. [~~§§2.102, 2.103.~~]

(2) - (19) (No change.)

(20) Non-Deceptive Polygraph Examination Result--A non-deceptive polygraph examination result must include no significant criteria normally associated with deception to the relevant questions. The examinee's salience should be focused on the comparison questions. Examiners will utilize an accepted numerical scoring system to ensure a non-deceptive result.

(21) [~~(20)~~] Offense Sequence--The specific sequence(s) of thoughts, feelings, behaviors, and events that may occur before, during, or after a sexual offense is committed.

(22) [~~(21)~~] Penile Plethysmograph (PPG)--A diagnostic method to assess sexual arousal by measuring the blood flow (tumescence) to the penis during the presentation of sexual stimuli in a controlled setting by providing the identification of a clients' physiological arousal in response to sexual stimuli (audio/visual).

(23) [~~(22)~~] Polygraph (Clinical) Examination--The employment of any instrumentation complying with the required minimum standards of the Texas Polygraph Examiner's Act and used for the purpose of measuring the physiological changes associated with deception. The following are descriptions of the four general types of polygraphs utilized:

(A) Instant Sexual Offense Polygraph--addresses the offense of conviction in conjunction or adjudication with the official version;

(B) Sexual History Polygraph--addresses the complete sexual history of the client up to the instant offense;

(C) Maintenance Polygraph--addresses compliance with conditions of supervision and treatment; and

(D) Monitoring Polygraph--addresses whether the client has committed a "new" sexual offense.

(24) [~~(23)~~] Polygraph Examiner--A person with a current license approved by the Texas Department of Licensing and Regulation [~~Texas Polygraph Examiners Board~~] and who meets minimum criteria to be listed by the Joint Polygraph Committee on Offender Testing (JPCOT) and/or the American Polygraph Association (APA) Post-Conviction Sex Offender Testing (PCSOT) Standards for polygraphing adult sex offenders and juveniles with sexual behavior problems.

(25) [~~(24)~~] Reoffense Prevention Plan--Is a multilevel plan assists the client in developing strategies to addresses the risk factors or precursors that have typically preceded sexual offenses.

(26) Safety Plan--A written document derived from the process of planning for community safety. The document identifies potential high-risk situation and addresses ways in which situations will be handled without the adult sex offender or juvenile placing others at risk.

(27) [~~(25)~~] Sex Offender--A person who:

(A) is or has been convicted or adjudicated of a sex crime under the laws of the State of Texas, any other state or territory, or under federal law, including a conviction of a sex crime under the Uniform Code of Military Justice;

(B) is or has been awarded deferred adjudication for a sex crime under the laws of the State of Texas, any other state or territory, or under federal law; or

(C) is or has been convicted, adjudicated, or received deferred adjudication for a sexually motivated offense which involved the intent to arouse or gratify the sexual desire of any person immediately before, during, or immediately after the commission of an offense.

(28) [~~(26)~~] Sex Offender Specific Treatment--Treatment modalities that are based on empirical research with regard to favorable treatment outcomes and are professionally accepted in the field of sex offender treatment and the treatment of juveniles with sexual behavior problems. Offense specific treatment means a long-term comprehensive set of planned treatment experiences and interventions that modify sexually deviant thoughts, fantasies, and behaviors and that utilize specific strategies to promote change and to reduce the chance of re-offending. Currently, the primary treatment modality is cognitive behavioral group treatment. Sex offender treatment does not include rehabilitation or clinical services provided in a criminal justice or juvenile justice institution as a part of the mainstream adjunct treatment programs.

(29) [~~(27)~~] Static Risk Factors--Risk factors that are unlikely to change over time.

(30) [~~(28)~~] Sub-Average General Intellectual Functioning--The measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used (Health and Safety Code, §591.003).

(31) [~~(29)~~] Successful Completion of Sex Offender Specific Treatment--May include but is not limited to admitting and accepting responsibility for all crimes, demonstrating the ability to control deviant sexual arousal, understanding sexual offense, increase in pro-social behaviors, increase in appropriate support systems, improved social competency, compliance with supervision, compliance with court conditions, increased understanding of victimization, no deception indicated on exit polygraphs, the indication of a non-deceptive examination result [~~completing and passing~~] on the sex history polygraph, approved safety plans, approved reoffense prevention plans, successful completion of adjunct treatments (for example: anger management, substance abuse, etc.), and the demonstrated integration and practical application of the skills presented in treatment. Each of these issues regarding successful completion of treatment shall be addressed unless precluded by §810.65 of this title (relating to the Assessment and Treatment of Juveniles with Sexual Behavior Problems), §810.67 of this title (relating to the Assessment and Treatment Standards for Developmentally Delayed Clients), or unless a state agency is exempt from a specific licensing requirement. The Licensed Sex Offender Treatment Provider after collaborating with appropriate criminal/juvenile justice personnel determines the successful completion of treatment.

(32) [~~(30)~~] Visual Reaction Time (VRT)--The measurement of sexual interest based on the relative amount of time spent looking at visual stimuli.

§810.3. License Required.

(a) - (b) (No change.)

[~~(c) In this section, current employees providing sex offender treatment in the Texas Department of Criminal Justice and the Texas Youth Commission who graduated from a regionally accredited undergraduate program with a degree in a behavioral health science shall be required to comply with the requirements in subsection (d)(1) - (3) of this section within 4 years from the date of the effectiveness of this Act.~~]

(c) [~~(d)~~] Sex offender treatment does not include rehabilitation or clinical services provided in a criminal justice or juvenile justice institution as a part of the mainstream adjunct treatment programs.

(1) Licensed Sex Offender Treatment Provider (LSOTP). To be eligible as a LSOTP, the applicant shall meet all of the following criteria:

(A) licensed in Texas to practice as a physician, psychiatrist, psychologist, licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, or advanced nurse practitioner recognized as a psychiatric clinical nurse specialist or psychiatric mental health nurse practitioner who provides services for the assessment and treatment of adult sex offenders and/or juveniles with sexual behavior problems. The mental health or medical license status shall be current and active:

(B) experience and training required as listed in clauses (i) - (ii) of this subparagraph:

(i) possess a minimum of 1000 documented and verified hours of clinical experience in the areas of assessment and treatment of sex offenders, obtained within a within the past 7-year period, and provide 1 reference letter from a licensed sex offender treatment provider or mental health professional who has actual knowledge of the applicant's clinical work in sex offender assessment and treatment; and

(ii) possess a minimum of 40 hours of documented continuing education training obtained within 3 years prior to the application date, in the specific area of sex offender assessment and treatment. Of the initial 40 hours training required, 30 hours shall be in the specific area of sex offender assessment and treatment. Ten hours shall be in sexual assault victim related training;

(C) submit a complete and accurate description of the applicant's treatment program on a form provided by the council;

(D) persons making initial application or renewing their eligibility for licensure shall adhere to Subchapter C. Standards of Practice and Subchapter D. Code of Professional Ethics to the extent the adherence does not conflict with other laws and shall comply with the following requirements:

(i) not have been convicted and/or adjudicated of any felony, or of any misdemeanor involving a sex offense or sexually motivated offense, nor have received deferred adjudication for a sex offense, and/or required to register as a sex offender under Texas Code of Criminal Procedure, Chapter 62;

(ii) not have had licensure revoked or canceled by any professional licensing body;

(iii) submit to a criminal history background check. An applicant shall be required to submit a complete set of fingerprints on the card provided by the council [~~Council~~] with the application documents, or other information necessary to conduct a criminal history background check to be submitted to the Texas Department of Public Safety or to another law enforcement agency unless exempt under this section. Fingerprints shall be taken by a peace officer or a person authorized by the council and shall be placed on a form prescribed by the Texas Department of Public Safety; and

(iv) not have violated the Act or any rule adopted by the council;

(E) submit an application fee as defined in §810.5 of this title (relating to Fees);

(F) submit a copy of his or her mental health or medical license, as set out in subparagraph (A) of this paragraph, and indicated that the applicant's license is current and in good standing;

(G) sign the application form(s) and attest to the accuracy of the application information; and

(H) complete the process within 90 days of the application's receipt in the council office.

(2) Affiliate Sex Offender Treatment Provider (ASOTP). To be eligible as a licensed ASOTP, the applicant shall meet all of the following criteria:

(A) licensed in Texas to practice as a physician, psychiatrist, psychologist, psychological associate, provisionally licensed psychologist, licensed professional counselor, licensed professional counselor intern, licensed marriage and family therapist, licensed marriage and family associate, licensed clinical social worker, licensed master social worker under a TSBSWE's approved clinical supervision plan, or an advanced nurse practitioner recognized as a psychiatric clinical nurse specialist or psychiatric mental health nurse practitioner who provides services for the assessment and treatment of adult sex offenders and/or juveniles with sexual behavior problems. The mental or medical health license status shall be current and active;

(B) experience and training required as listed in clauses (i) - (iii) of this subparagraph:

(i) possess a minimum of 250 documented and verified hours of clinical experience in the areas of assessment and treatment of sex offenders and/or juveniles with sexual behavior problems, obtained within the past 7-year period, and provide 1 reference letter from a licensed sex offender treatment provider or mental health professional who has actual knowledge of the applicant's clinical work in sex offender assessment and treatment;

(ii) be supervised by a LSOTP in accordance with paragraph (6)(A) - (D) of this subsection until LSOTP status is obtained and submit a copy of the LSOTP supervisor's license indicating that the applicant is current and in good standing; and

(iii) possess a minimum of 40 hours of documented continuing education training obtained within 3 years prior to application date, in the specific area of sex offender assessment and treatment. Of the initial 40 hours training required, 30 hours shall be in sex offender specific training. Ten hours shall be in sexual assault victim related training;

(C) submit a complete and accurate description of the applicant's treatment program on a form provided by the council;

(D) comply with paragraph (1)(D)(i) - (iv) of this subsection;

(E) persons making initial application or renewing their eligibility for licensure shall adhere to Subchapter C. Standards of Practice and Subchapter D. Code of Professional Ethics to the extent the adherence does not conflict with other laws;

(F) submit an application fee as defined in §810.5 of this title;

(G) submit a copy of the applicant's medical or mental health license as set out in subparagraph (A) of this paragraph, indicating the applicant is current and in good standing;

(H) sign the application form(s) and attest to the accuracy of the application information; and

(I) complete the process within 90 days of the application's receipt in the council office.

(J) After completing the required documented clinical and continuing education hours and depending upon the status of the licensee's mental or medical license, the ASOTP may be upgraded to a LSOTP. The licensee does not need to submit a new application if the ASOTP license is current. Licensees will be notified if there are any deficiencies.

(3) Provisional Sex Offender Treatment Provider (PSOTP). To be eligible as a licensed PSOTP, the applicant shall meet all of the following criteria:

(A) licensed in Texas to practice as a physician, psychiatrist, psychologist, psychological associate, provisionally licensed psychologist, licensed professional counselor, licensed professional counselor intern, licensed marriage and family therapist, licensed marriage and family associate, licensed clinical social worker, licensed master social worker under a TSBSWE's approved clinical supervision plan, or an advanced nurse practitioner recognized as a psychiatric clinical nurse specialist or psychiatric mental health nurse practitioner who provides services for the assessment and treatment of adult sex offenders and/or juveniles with sexual behavior problems. The mental or medical health license status shall be current and active;

(B) experience and training required as listed in clauses (i) - (iii) of this subparagraph:

(i) possess 0 to 1000 documented and verified hours of clinical experience in the areas of assessment and treatment of sex offenders, obtained within the past 7-year period, and provide 1 reference letter from a licensed sex offender treatment provider or mental health professional who has actual knowledge of the applicant's clinical work in sex offender assessment and treatment;

(ii) supervised by a LSOTP in accordance with paragraph (6)(A) - (D) of this section until LSOTP status is obtained and submit a copy of the LSOTP supervisor's license, and indicated that the applicant is current and in good standing. A PSOTP applicant is exempt from supervision if the applicant is only lacking the CE requirements necessary to become a LSOTP; and

(iii) possess a minimum of 40 hours of documented continuing education training obtained within 24 months of the date of application, in the specific area of sex offender assessment and treatment. Of the initial 40 hours training required, 30 hours shall be in sex offender specific training. Ten hours shall be in sexual assault victim related training;

(C) submit a complete and accurate description of the applicant's treatment program on a form provided by the council;

(D) comply with paragraph (1)(D)(i) - (iv) of this subsection [~~section~~];

(E) persons making initial application or renewing their eligibility for licensure shall adhere to Subchapter C. Standards of Practice and adhere to Subchapter D. Code of Professional Ethics to the extent the adherence does not conflict with other laws;

(F) submit an application fee defined in §810.5 of this title;

(G) submit a copy of the applicant's medical or mental health license as set out in subparagraph (A) of this paragraph, indicating the applicant is current and in good standing;

(H) sign the application form(s) and attest to the accuracy of the application information; and

(I) complete the process within 90 days of the application's receipt in the council office.

(J) After completing the required documented clinical and continuing education hours, the PSOTP may be upgraded to the LSOTP or ASOTP license based on the number of completed hours and depending upon the status of the licensee's medical or mental health license. The licensee does not need to submit a new application if the PSOTP license is current. Licensees will be notified if there are any deficiencies.

(4) Licensing Out-of-State Applicants/Reciprocity. The council may waive any prerequisite to licensing for an application after receiving the applicant's credentials and determining that the applicant holds a valid sex offender treatment license from another state that has license requirements substantially equivalent to those of this state.

(5) Request for Criminal History Evaluation Letter.

(A) In accordance with Occupations Code, §53.102, a person may request the council to issue a criminal history evaluation letter regarding the person's eligibility for a license if the person:

(i) is enrolled or planning to enroll in an educational program that prepares a person for an initial license or is planning to take an examination for an initial license; and

(ii) has reason to believe that the person is ineligible for the license due to a conviction for a felony or misdemeanor offense.

(B) A person making a request for issuance of a criminal history evaluation letter shall submit the request on a form prescribed by the council, accompanied by the criminal history evaluation letter fee and the required supporting documentation, as described on the form. The request shall state the basis for the person's potential ineligibility.

(C) The council has the same authority to investigate a request submitted under this section and the requestor's eligibility that the council has to investigate a person applying for a license.

(D) If the council determines that a ground for ineligibility does not exist, the council shall notify the requestor in writing of the determination. The notice shall be issued not later than the 90th day after the date the council received the request form, the criminal history evaluation letter fee, and any supporting documentation as described in the request form.

(E) If the council determines that the requestor is ineligible for a license, the council shall issue a letter setting out each basis for potential ineligibility and the council's determination as to eligibility. The letter shall be issued not later than the 90th day after the date the council received the request form, the criminal history evaluation fee, and any supporting documentation as described in the request form. In the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the council at the time the letter is issued, the board's ruling on the request determines the requestor's eligibility with respect to the grounds for potential ineligibility set out in the letter.

(6) Inactive Status.

(A) A licensee may place his or her license on inactive status by submitting a written request prior to the expiration of the license along with the inactive fee to the council. Inactive status periods shall be granted only to persons whose licenses are current or whose licenses have been expired for less than 1 year.

(B) An inactive status period shall begin on the first day of the month following payment of an inactive status fee.

(C) A person may not act as a licensee, represent himself or herself as a licensee, or provide sex offender treatment during the inactive status period, unless exempted by the Act.

(D) A person may remain subject to investigation and action under §810.9 of this title (relating to Complaints, Disciplinary Actions, Administrative Hearings, and Judicial Review) during the period of inactive status.

(E) A person must notify the council in writing to return to active status. Active status shall begin after receipt of proof of successful completion of 24 hours continuing education within the 2 years preceding reinstatement of active status and payment of applicable fees.

(F) The person's next continuing education cycle will begin upon return to active status and end on the day of license expiration.

(G) A person previously approved as a supervisor whose license has been inactive for more than 2 years and who resumes active license status may become a supervisor by again completing the supervision requirements of the council.

(H) A person who is granted an inactive status by the person's mental health or medical license under §810.2(a)(12) of this title (relating to Definitions) shall be required to request an inactive status under this section.

(I) The licensee must renew the inactive status every 2 years.

(7) Active Military.

(A) For purposes of this section, a "designated representative" is a person authorized in writing by the licensee to act on behalf of the licensee. A copy of the written designation must be provided to the council.

(B) If a licensee fails to renew his or her license because the licensee is called to or is on active duty with the armed forces of the United States serving outside of the State of Texas, the licensee or the licensee's designated representative may request that the license be declared inactive or be renewed. A request for inactive status shall be made in writing to the council prior to expiration of the license or within one year from the expiration date. A request for renewal may be made before or after the expiration date.

(i) A written request shall include a copy of the official transfer orders of the licensee or other official military documentation showing that the licensee is called to or on active duty serving outside of the State of Texas.

(ii) The payment of the inactive status fee, late renewal fee and licensure renewal penalty fee is waived for a licensee under this section.

(iii) An active duty licensee shall be allowed to renew under this section without submitting proof of continuing education hours.

(iv) The written request shall include a current address and telephone number for the licensee or the licensee's designated representative.

(v) The council may periodically notify the licensee or the licensee's designated representative that the license of the licensee remains in inactive status.

(vi) If a licensee is a civilian impacted or displaced for business purposes outside of the State of Texas due to a national emergency or war, the licensee or the licensee's designated representative may request that the license be declared inactive in the same manner as described in this section for military personnel. The written request shall include an explanation of how the licensee is impacted or displaced, which explanation shall be on the official letterhead of the licensee's business. The requirements of this section relating to renewal by active duty licensees shall not apply to a civilian under this paragraph.

(8) [~~(5)~~] Specialized Competencies. Licensed Sex Offender Treatment Providers with specialized competencies in the assessment and treatment of juveniles with sexual behavior problems, female sex offenders, and/or developmentally delayed sex offenders may have those competencies documented by the council [~~Council~~], provided the following criteria is met:

(A) possess at least 250 documented and verified hours experience with each population in the assessment and treatment of juveniles with sexual behavior problems, female sex offenders, and/or developmentally delayed sex offenders; these hours may be part of the original training and experience hours required for the new application and original CE requirements up to 7 years prior;

(B) possess a minimum of 24 hours of documented continuing education training with each population in the assessment and treatment of juveniles with sexual behavior problems, female sex offenders, [~~and/or~~] developmentally delayed sex offenders; and/or deregistration evaluation specialist these hours may be part of the original training and experience hours required for the original certification;

(C) possess a minimum of 3 hours of documented continuing education training with each population in the assessment and treatment of juveniles with sexual behavior problems, female sex offenders, and/or developmentally delayed sex offenders for renewal of the specialized competencies; and

(D) pay a biennial fee for each specialty as defined in §810.5(e) of this title.

(9) [~~(6)~~]Supervision. All ASOTPs and PSOTPs providing sex offender assessment and treatment shall be supervised unless exempt under paragraph (3)(B)(ii) of this subsection. Supervision will include the following:

(A) An ASOTP and PSOTP providing sex offender assessment and treatment is required to be under the supervision of a LSOTP supervisor approved by the council [~~Council~~] unless exempt under paragraph (3)(B)(ii) of this subsection. The ASOTP and PSOTP shall provide a copy of supervision documentation to the council during the renewal period unless exempt under paragraph (3)(B)(ii) of this subsection.

(B) An LSOTP that has not been a supervisor approved by the council [~~Council~~] prior to the effective date of this rule shall meet the following criteria:

(i) possess 5 years experience as a RSOTP, or 5 years documented experience in the field of sex offender assessment and treatment, and/or an approved supervisor with another mental health license who has documented experience in the field of sex offender assessment and treatment;

(ii) sign and acknowledge the LSOTP supervisor's responsibilities form;

(iii) submit a biennial fee as defined in §810.5(f) of this title; and

(iv) obtain 3 hours documented continuing education in the supervision of sex offender treatment providers or in general supervision of other mental health professionals every 4 years.

(C) An ASOTP and PSOTP shall receive face-to-face supervision at least 1 hour per 20 hours of assessment and treatment with a minimum of 2 hours per month during any time period in which the supervisee provides sex offender treatment unless exempt under subparagraph (B)(ii) of this paragraph. Exceptions to supervision requirements shall be approved on a case-by-case basis by the council.

(D) The supervising LSOTP shall submit the required documentation to the council at the time of the renewal; the documentation shall contain the name(s) of the ASOTP(s) and PSOTP(s) and hours that each has been supervised during the renewal cycle. The supervising LSOTP shall be required to use the form(s) provided by the council.

(10) [~~(7)~~] License Certificates. Upon completion of the application or renewal process, licensees shall receive an official certificate and renewal cards from the council. The certificate shall be displayed at all locations where sex offender assessment and treatment is provided. As set forth in §810.5(g) of this title, duplicate certificates may be obtained for a nominal fee.

(A) The council [~~Council~~] shall prepare and provide to each licensee a certificate and initial and renewal cards which contain the licensee's name and certificate number.

(B) A licensee shall not display a license certificate(s) or renewal card(s) which have been reproduced or are expired, suspended, or revoked.

(C) A license certificate(s) or renewal card(s) issued by the council remains the property of the council and shall be surrendered to the council upon demand.

(D) The address and telephone number of the council shall be displayed at all locations where sex offender assessment and treatment is conducted and/or the licensee shall provide a copy to the client on initial intake for the purpose of directing complaints against the licensee to the council.

(11) [~~(8)~~] Application processing. The council shall comply with the following procedures in processing applications for a license.

(A) The following times shall apply from a completed application receipt and acceptance date for filing, or until the date a written notice is issued stating the application is deficient and additional specific information is required. A written notice of application approval may be sent instead of the notice of acceptance of a complete application. The times are as follows:

(i) letter of acceptance of application for licensure--30 days;

(ii) letter of acceptance of application for renewal--30 days; and

(iii) letter of initial application deficiency--30 days.

(B) The following times shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The times for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. The times are as follows:

(i) approval of application--42 days; and

(ii) letter of denial of licensure--90 days.

(12) [~~(9)~~] Refund processing. The council shall comply with the following procedures in processing refunds of fees paid to the council. In the event an application is not processed in the times stated in paragraph (11)(A) - (B) [~~(8)(A) - (B)~~] of this subsection.

(A) An applicant has the right to request reimbursement of all fees paid in that particular application process. Application for reimbursement shall be made to the executive director. If the executive director does not agree that the time has been violated or finds that good cause existed for exceeding the time, the request shall be denied.

(B) Good cause for exceeding the time is considered to exist if the number of applications for a license or renewal exceeds by 15% or more the applications processed in the same calendar quarter of the preceding year; another public or private entity relied upon by the council in the application process caused the delay; or any other condition exists giving the council good cause for exceeding the time.

(C) If the executive director denies a request for reimbursement under subparagraph (A) of this paragraph the applicant may appeal to the council for a timely resolution of any dispute arising from a violation of the processing times. The applicant shall give written notice to the council at the address of the council that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time. The executive director shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time. The council shall provide written notice of the decision to the applicant and the executive director. The council shall decide an appeal in favor of the applicant, if the applicable time was exceeded and good cause was not established. If the council decides the appeal in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

§810.4. License Issuance and/or Renewal.

Beginning September 1, 2006, all new initial licenses shall expire on the last day of the licensee's birth month. The initial licensing period shall be at least 13 months and no more than 30 months. Subsequent licensing periods will be 24 months. In order to maintain eligibility for the licensure as a sex offender treatment provider, the mental health or medical license of each renewal shall be current and active. All renewal applicants shall comply with the following:

(1) Number of continuing education (CE) hours. All renewal applicants shall acquire by the end of the 2-year cycle, a minimum of 24 hours of documented continuing education. Six hours shall be in ethics and 12 [~~18~~] shall be in sex offender assessment and treatment of which 6 hours shall [~~may~~] be in sexual assault victim-related training, beginning September 1, 2011 [~~, 2006~~].

(2) - (3) (No change.)

(4) The audit process shall be as follows.

(A) - (B) (No change.)

(C) Failure to [~~timely~~] furnish this information within 2 weeks of receipt of the audit forms or knowingly providing false information during the audit process or the renewal process are grounds for disciplinary action against the licensee.

(5) - (8) (No change.)

(9) Licensees shall request pre-approval from the council for all online courses and courses taken at an institution of higher learning. All renewal applicants may count a maximum of 6 online hours per biennial renewal period not including ethic hours.

(10) - (14) (No change.)

§810.5. Fees.

(a) New Applicant Fees. The council has established the following license fees.

(1) All new LSOTP, ASOTP, and PSOTP applicants shall submit a non-refundable $375 [~~$300~~] fee for a biennial application. Additional fees will be charged for Federal Bureau of Investigations and Texas Department of Public Safety criminal background checks unless exempt under §810.34 of this title (Relating to Frequency of Criminal Background Checks). Fees shall be determined by those agencies conducting the investigation.

(2) All applicants shall comply with the following requirements:

(A) - (B) (No change.)

(C) submit within 90 calendar days of written notification from the council [~~Council~~] any documentation required.

(b) Renewal Fees. Renewal forms and information shall be mailed to each licensee at least 60 days prior to license expiration and mailed to the licensee's last known address as reflected in the council's records.

(1) (No change.)

(2) To renew, a LSOTP, ASOTP, or PSOTP shall include a non-refundable $275 [~~$200~~] fee for a biennial renewal. All applicants shall comply with the following requirements.

(A) - (D) (No change.)

(c) Criminal History Evaluation Letter. A $50 fee shall be assessed to a person who requests a criminal history evaluation letter from the council.

(d) [~~(c)~~] Effective January 1, 2004, for all new applications and renewal applications, the council is required to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through the texas.gov [~~Texas Online~~].

(e) [~~(d)~~] Effective January 1, 2004, for all new applications and renewal applications, the council is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(f) [~~(e)~~] Specialty Fees. Applicants that meet the specialized competency criteria involving the treatment of juveniles with sexual behavior problems, females, [~~and/or~~] developmentally delayed populations, and/or deregistration assessments shall submit a non-refundable $40 specialty fee for each biennial period.

(g) [~~(f)~~] Supervisor Fees. Licensees that meet the LSOTP supervisor criteria and who seek to be designated as an approved LSOTP supervisor shall submit a non-refundable $40 credentialing fee for each biennial period.

(h) Inactive Fee. Licensees who request an inactive status shall submit a non-refundable $50 fee.

(i) [~~(g)~~] Duplicate Certificates. Licensees who request duplicate certificates shall be charged a non-refundable $10 fee per certificate.

§810.8. Revocation, Denial, or Non-Renewal of a License.

(a) (No change.)

(b) The council may take action against a licensee or deny an application or renewal in accordance with Occupations Code, Chapter 53, if the licensee has felony or misdemeanor convictions that directly relate to the duties and responsibilities as [~~of~~] a sex offender treatment provider.

§810.9. Complaints, Disciplinary Actions, Administrative Hearings, and Judicial Review.

(a) (No change.)

(b) Review of the complaint.

(1) The executive director shall initially review the complaint for violations of the Act or any rule adopted by the council. The executive director may accept an anonymous complaint if there is sufficient information for the investigation.

(2) If it is determined that the matters alleged in the complaint are non-jurisdictional, the executive director, with the concurrence of the Ethics Committee Chair, may close the complaint and give written notice of closure to the licensee or person against whom the complaint has been filed, the complainant, and the complaints committee. If it is determined that a violation of the Act or these sections may have occurred, the executive director or executive director's designee shall:

(A) - (C) (No change.)

(c) The executive director shall refer pending jurisdictional complaints to the Ethics Committee. The Ethics Committee shall:

(1) review each complaint and determine whether the complaint fits within the category of a valid complaint affecting the health and safety of clients or other persons;

(2) ensure that complaints are not dismissed without appropriate consideration;

(3) ensure that a person who files a complaint has an opportunity to explain the allegations made in the complaint; and

(4) resolve the issues of the complaint which arise under the Act or this chapter.

(d) If it is determined that there are sufficient grounds to support the complaint, the matters in question shall be investigated. The executive director or the Ethics Committee may initiate the investigation.

(e) If the Ethics Committee determines that there are insufficient grounds to support the complaint, the committee shall dismiss the complaint and give written notice of the dismissal to the licensee or person against whom the complaint has been filed and the complainant.

(f) [~~(c)~~] Responsibilities of the licensee.

(1) A licensee shall cooperate with the council by furnishing all required documents or information and by responding to a request for information or a subpoena issued by the council or its authorized representative.

(2) A licensee shall comply with any order issued by the council relating to the licensee. A licensee shall not interfere with a council investigation by the willful misrepresentation of facts to the council or its authorized representative or by the use of threats or harassment against any person.

(3) The licensee shall be notified of the allegations in writing by the executive director or designee and shall be required to provide a response to the allegations within 20 calendar days of that notice.

(4) Failure to respond to the allegation within the 20 day period is evidence of licensee's failure to cooperate with the investigation and may subject the licensee to disciplinary action.

(g) [~~(d)~~] Actions by the council. The council is authorized to revoke, suspend, or deny a license, or to deny a renewal of a license, place on probation a person whose license has been suspended, assess an administrative penalty, or reprimand a licensee for a violation of the Act or a rule of the council.

(h) [~~(e)~~] Probated Suspension. If the suspension is probated, the council is authorized by Occupations Code, §110.352, to impose certain requirements and limitations on a person.

(i) [~~(f)~~] Disciplinary action on the mental health or medical license. If a licensee's mental health or medical license is revoked or suspended, the council may propose to revoke a license issued under this chapter.

(j) [~~(g)~~] Complaint information. The council shall retain all complaints filed with the council for 7 years from the date of closure. The information shall include:

(1) the date the complaint is received;

(2) the name of the complainant;

(3) the subject matter of the complaint;

(4) a record of all witnesses contacted in relation to the complaint;

(5) a summary of the results of the review, investigation of the complaint, and any action taken; and

(6) for a complaint for which the council [~~Council~~] took no action, an explanation of the reason the complaint was closed without action.

(k) [~~(h)~~] Formal hearing.

(1) A [~~The~~] formal hearing shall be conducted according to the provisions of the Texas Government Code, Chapter 2001, Administrative Procedure Act and held in Travis County, Texas, unless otherwise determined by the Administrative Law Judge (ALJ) or upon agreement of the parties.

(2) Prior to institution of formal proceedings to revoke or suspend a license, the executive director shall give written notice to the licensee by certified mail, return receipt requested, of the facts or conduct alleged to warrant revocation or suspension, and the person shall be given the opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.

(3) To initiate formal hearing procedures, the executive director shall give the licensee written notice of the opportunity for hearing. The notice shall state the basis for the proposed action. Within 20 calendar days after receipt of the notice, the licensee shall give written notice to the executive director that the licensee waives the hearing and either surrenders the license, or accepts the proposed sanction, or requests an informal settlement conference and/or a formal hearing. Receipt of the notice is deemed to occur on the seventh calendar day after the notice is mailed to the licensee's last reported address as reflected in the council's records unless another date of receipt is reflected on a U.S. Postal Service return receipt.

(A) If the licensee fails to request a hearing within the proscribed period, the licensee is deemed to have waived the hearing and a default order may be entered by the council.

(B) If the licensee requests an informal settlement conference and/or a formal hearing, within 20 calendar days after receiving the notice of opportunity for hearing, the executive director shall initiate an informal settlement conference and/or formal hearing procedures in accordance with this section.

(l) [~~(i)~~] Final action.

(1) If the council suspends a license, the suspension remains in effect for the period of suspension ordered or until the council determines that the reasons for suspension no longer exist. The licensee whose license has been suspended is responsible for securing and providing to the executive director such evidence that the reasons for the suspension no longer exist. The council shall review and investigate the evidence prior to making a determination.

(2) During the time of suspension, the former licensee shall return all license certificate(s) and renewal card(s) to the council.

(3) If a suspension overlaps a renewal period, the former licensee shall comply with the normal renewal procedures in these sections. The council shall not renew the certificate until the executive director or the council determines that the reasons for suspension have been removed.

(4) A person whose application is denied or whose license certificate is revoked is ineligible to apply for licensure under this Act for 1 year from the date of the denial or revocation.

(5) Upon revocation or non-renewal, the former licensee shall return all certificate(s) and renewal card(s) issued to the licensee by the council. The certificate(s) and renewal card(s) shall be returned to the council by certified mail, hand-delivered, or by a delivery service, within 30 days of request.

(m) [~~(j)~~] Appeal of the [~~a~~] decision. A person may appeal a final decision of the council by filing a petition for judicial review in the manner provided by the Texas Government Code, §2001.176.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

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Liles Arnold
Chair
Council on Sex Offender Treatment
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 458-7111 x6972

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22 TAC §810.6

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeal affects Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the section implements Government Code, §2001.039.

§810.6. Applicant Availability.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. CRIMINAL BACKGROUND CHECK

22 TAC §§810.31 - 810.34

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of

administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The amendments affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.31. Access to Criminal History Records.

The council is authorized to obtain information from the Texas Department of Public Safety or the Federal Bureau of Investigation about a conviction or deferred adjudication that relates to an applicant seeking licensure. The council is authorized to obtain a criminal history record from any law enforcement agencies [~~agency~~]. The criminal history record information received under this section is for the exclusive use of the council and is privileged and confidential. The criminal history record information shall not be released or otherwise disclosed to any person or agency except on court order or with the written consent of the applicant.

§810.32. Records.

All other records of the council that are not made confidential by other law are open to inspection by the public during regular office hours. The content [~~contents~~] of the criminal background checks [~~check~~] on each licensee are not public records and are confidential. Unless expressed in writing by the chairperson of the council, the executive director and the executive director's designee are the only staff authorized to have daily access to the criminal history records. These records will be maintained in separate files and not in the licensee files.

§810.33. Destruction of Criminal History Records.

The council shall destroy conviction/ adjudication information relating to a person after the council makes a decision on the eligibility of the applicant unless the information was the basis for a proposed denial, revocation, suspension, or refusal to renew a person's license. The council shall destroy the information provided by the Texas Department of Public Safety, the Federal Bureau of Investigation or any other law enforcement agency. [~~, and the submitted applicant's fingerprint card.~~] In the event that information is collected online, all files created will be destroyed in the aforementioned timeframe.

§810.34. Frequency of Criminal Background Check.

(a) (No change.)

(b) State or Federal Governmental Employees Criminal History. Any employee of a state or federal governmental agency that conducts annual national and Texas criminal history checks on its [~~it's~~] employees may substitute a certification from that employer for any requirement for a criminal background check. The governmental entity shall provide a certification if the employees criminal history changes. Fees for criminal history records may be waived if the applicant is unable to produce an employer certification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. STANDARDS OF PRACTICE

22 TAC §§810.61 - 810.68

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The amendments affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.61. Introduction to the State Standards of Practice.

These state standards were developed by the council to delineate appropriate assessment and treatment procedures and policies in Texas. These standards address the [~~delineate~~] professional licensing expectations for the assessment and treatment of adult sex offenders and juveniles with sexual behavior problems.

§810.62. State Standards of Practice.

(a) Interventions shall be designed to assist the individual to effectively manage thoughts, feelings, attitudes, and behaviors associated with their risk to reoffend. Structured, cognitive behavioral skills-oriented treatment programs shall target specific criminogenic needs to reduce re-offense rates. Interventions utilized in the assessment and treatment of sex offenders and juveniles with sexual behavior problems shall be empirically validated and generally accepted by professionals in this field.

(b) (No change.)

§810.63. General Assessment Standards (Adults and Juveniles).

(a) - (b) (No change.)

(c) In preparing assessments of adult sex offenders and juveniles with sexual behavior problems, licensees shall:

(1) - (6) (No change.)

(7) administer, score, interpret and/or utilize assessment techniques, tests or instruments in a manner and for purposes for which there are professional or scientific bases;

(8) administer, score, interpret and/or utilize assessment techniques, tests or instruments in a manner and for purposes for which the assessment technique has been standardized;

(9) not utilize assessment techniques, tests or instruments that are outdated or obsolete as determined by the council;

(10) not base their assessment or intervention decisions or recommendations on data or test results that are outdated, obsolete or not useful for the current purpose as determined by the council;

(11) [~~(7)~~] acknowledge if an assessment consisted of only a clinical review without client contact and shall clarify the impact that limited information has on the reliability and validity of the resulting report;

(12) [~~(8)~~] provide clients in writing informed consent, statement of disclosures, releases and/or exceptions to confidentiality, and employ verbal explanations for clients who do not meet the reading or comprehension level required;

(13) [~~(9)~~] thoroughly review written documentation and collateral interviews. The information from all available and relevant sources, may include but is not limited to:

(A) criminal investigation records;

(B) child protective services investigations;

(C) previous assessments and treatment progress reports;

(D) mental health records and assessments;

(E) medical records;

(F) Texas Department of Criminal Justice and Texas Youth Commission records;

(G) probation records;

(H) information regarding details of the offense as obtained by law enforcement; and

(I) the official victim statement(s).

(14) [~~(10)~~] diligently interpret assessments conducted without collateral information;

(15) [~~(11)~~] ensure written assessments document and acknowledge the procedures employed, summaries, conclusions, recommendations, and all collateral reports and interviews;

(16) [~~(12)~~] new interviews or repeated interviews of victims should not be required during the client's assessment; these should only be used when there is no discernible risk of harm or discomfort to the victim; and

(17) [~~(13)~~] when the assessment of a client and a victim are concurrent, the licensee shall be vigilant to remain objective in the administration of procedures and the interpretation of the information obtained through the interview or other means.

(d) Licensees shall subscribe and adhere to the following tenets regarding the client assessment.

(1) - (4) (No change.)

(5) Recommendations for treatment should be based on the presence of factors known to be related to sexual offense risk and/or the absence of skills known to impact the reduction and/or management of risk factors related to sexual offense risk.

(6) [~~(5)~~] When formulating recommendations, community safety and the degree to which a client is capable and willing to manage risk shall be considered.

(7) [~~(6)~~] If a significant amount of time has lapsed between the time of the assessment and when the client is accepted into a treatment program, an assessment update shall be required.

(8) [~~(7)~~] An assessment update shall collect current data upon which the original treatment plan can either be confirmed or amended.

(9) [~~(8)~~] Licensees shall make an effort to recommend the most appropriate treatment program available and objectively state the level of risk management regardless of whether existing limited resources preclude adequate or appropriate services.

§810.64. Assessment and Treatment Standards for Adult Sex Offenders.

(a) - (b) (No change.)

(c) Efforts shall be made to acquire the following information gathered in the assessment process:

(1) - (16) (No change.)

(17) official report regarding the instant sexual offense (Occupations Code, Chapter 109, §109.054);

(18) - (20) (No change.)

(d) Treatment Standards for Adult Sex Offenders. Licensees shall adhere to the following standards when providing treatment to an adult sex offender:

(1) - (11) (No change.)

(12) a licensee may terminate services and facilitate a transfer of a client from treatment based on a complaint having been filed against the licensee by the client and/or the client's representative(s);

(13) [~~(12)~~] a licensee shall immediately notify the appropriate authority when a client refuses or fails to comply with court-ordered treatment or Texas Board of Pardons and Paroles ordered treatment;

(14) [~~(13)~~] some degree of denial shall not preclude a client from entering treatment, although the degree of denial shall be a factor in identifying the most appropriate form and location of treatment;

(15) [~~(14)~~] modifications in treatment and in expectations for treatment outcomes may be required in instances of persistent denial;

(16) [~~(15)~~] a licensee shall not rely exclusively on self report by the client to assess progress or compliance with treatment requirements and/or conditions of probation or parole. Licensees shall rely on multiple sources of information, which should include information from collateral contacts, physiological methods, and other research-based sexual interest assessments;

(17) [~~(16)~~] physiological methods or measures of sexual interest assessment shall not replace other forms of monitoring but may improve accuracy when combined with active surveillance, collateral verifications, and self-report. Penile plethysmograph (PPG) assessments in Texas shall be conducted under the direction of a licensed practitioner defined in Health and Safety Code, Chapter 1, §1.005. Licensees should refer the client for a polygraph exam as soon as possible if the client is suspected of engaging in suppression behaviors on the PPG;

(18) [~~(17)~~] polygraph examinations shall only be administered by licensed polygraph examiners that meet and adhere to the "Recommended Guidelines for the Clinical Polygraph Examinations of Sex Offenders" as developed by the Joint Polygraph Committee on Offender Testing (JPCOT) and/or the American Polygraph Association (APA) regarding Post-Conviction Sex Offender Testing (PCSOT) Standards. It is primarily the licensed sex offender treatment provider's responsibility for preparing the client for any polygraph. Sexual history polygraphs shall include all aspects of a client's sexual behaviors and a victim's list that occurred prior to the offense of conviction. Licensed sex offender treatment providers shall obtain the official offense report (Occupations Code, Chapter 109, §109.054) and shall ensure the polygraph examiner has the official offense report in order to administer the instant offense polygraph examination. The sex offender treatment provider shall recognize that the polygraph examiner is the authority in determining if a polygraph is appropriate;

(19) [~~(18)~~] informed consent shall be obtained prior to engaging clients in aversive conditioning;

(20) [~~(19)~~] licensees shall communicate and exchange information with the Department of Family Protective Services-Child

Protective Services, Child Care Licensing, and with appropriate agencies regarding the safety of a child or children in the primary residence in which a sex offender resides;

(21) [~~(20)~~] the safety of the children takes precedence and the highest priority shall be given to the rights, well-being, and safety of children when making decisions about contact between the client and children. If the client has a history of deviant sexual arousal and/or deviant sexual interest to or reported fantasies of sexual contact with children, client should be restricted from having access to children. Supervised visits may be considered if:

(A) it is determined that sufficient safeguards exist to protect the child(ren);

(B) the sex offender has demonstrated control over deviant arousal;

(C) it does not impede the sex offender's progress in treatment; and

(D) if it is compliant with the court mandated or Texas Board of Pardons and Paroles ordered conditions.

(22) [~~(21)~~] treatment referrals should be offered to the non-offending partners and children in cases where a parent or legal guardian has been removed;

(23) [~~(22)~~] family support and participation in the treatment of the adult sex offender should be included when applicable and appropriate. Sexual assault victims or vulnerable children shall be excluded until such time as joint therapy is determined to be appropriate;

(24) [~~(23)~~] the licensee shall make every effort to collaborate with the victim's therapist in making decisions regarding communication, visits and reunification. Contact shall be arranged in a manner that places child/victim safety first. The licensee shall ensure that custodial parents or legal guardians of the children have been consulted prior to authorizing contact and that the contact is in accordance with Court or Texas Board of Pardons and Paroles directives; and

(25) [~~(24)~~] if reunification is deemed appropriate by the victim's therapist, the process shall be closely supervised. There shall be provisions for monitoring behavior and reporting rule violations. A victim's comfort and safety shall be assessed on a continuing basis.

(e) Adult Laws. Licensees shall be familiar with and adhere to the criminal justice system and confidentiality laws concerning adult sex offender and victims of sexual assault. The legal citations include but are not limited to:

(1) - (2) (No change.)

(3) Code of Criminal Procedure, Chapter 62, Sex Offender Registration; [~~and~~]

(4) Code of Criminal Procedure, Article 42.12;[~~.~~]

(5) Occupations Code, Chapter 109 (Specifically §109.051 and §109.052);

(6) Code of Criminal Procedure, Chapter 56; and

(7) Federal Justice for All Act of 2004.

§810.65. Assessment and Treatment Standards for Juveniles with Sexual Behavior Problems.

(a) (No change.)

(b) Assessment Standards for Juveniles with Sexual Behavior Problems.

(1) (No change.)

(2) The assessment shall focus on strengths, risks, and needs of the juvenile with sexual behavior problems, and shall identify factors from social and sexual history which may contribute to sexual deviance and minimize the likelihood that the individual will engage in delinquent or abusive behavior. Assessments shall form the basis or foundation of a comprehensive treatment plan and recommendations regarding the intensity of intervention, specific treatment protocol needed, and amenability to treatment, as well as the identified risk the juvenile with sexual behavioral problems presents to the community. A comprehensive [~~evaluation and~~] assessment of juveniles with sexual behavior problems shall be an ongoing and continuing process.

(3) - (10) (No change.)

(c) - (f) (No change.)

(g) Polygraphs. The licensed sex offender treatment provider is primarily responsible for preparing the juvenile for any polygraph. If polygraphs are utilized, the licensed sex offender treatment provider shall:

(1) - (2) (No change.)

(3) ensure that the polygraph is administered on a voluntary basis and with informed consent unless court ordered (Family Code, §54.0405 Juvenile Probation); [~~and~~]

(4) ensure that the polygraph examiner is listed on the JPCOT roster and/or trained by the American Polygraph Association (APA) in Post-Conviction Sex Offender Testing (PCSOT); and

(5) (No change.)

(h) - (i) (No change.)

(j) Juvenile Laws. Licensees shall be familiar with and adhere to the juvenile justice system and confidentiality laws concerning juveniles with sexual behavior problems and the victims of sexual assault. The legal citations include but are not limited to:

(1) - (3) (No change.)

(4) Texas Family Code, §153.076, Duty to Provide Information; [~~and~~]

(5) Code of Criminal Procedure, Chapter 62, Sex Offender Registration;[~~.~~]

(6) Occupations Code, Chapter 109 (Specifically §109.051 and §109.052);

(7) Code of Criminal Procedure, Chapter 56; and

(8) Federal Justice for All Act of 2004.

§810.66. Standards for Adult Female Sex Offenders.

Licensees shall subscribe and adhere to the following tenets regarding female sex offenders:

(1) - (2) (No change.)

(3) Female [~~Females~~] sex offenders shall be assessed for deviant sexual interest and arousal using appropriate [~~and validated physiological and psychological~~] measures.

(4) (No change.)

(5) Group treatment of female sex offenders shall not [~~may~~] be conducted with male sex offenders due to issues related to past victimization, stereotypical gender roles, experiences with domestic violence, and differential patterns in relating to others within the context of treatment.

(6) - (7) (No change.)

§810.67. Assessment and Treatment Standards for Developmentally Delayed Clients.

(a) These standards delineate research-based practices for developmentally delayed clients. Licensees shall subscribe and adhere to the following tenets for developmentally delayed clients:

(1) - (3) (No change.)

(4) developmentally delayed clients shall be given the opportunity to exercise their right to make a voluntary and informed decision to participate in treatment. While clients may refuse to participate in or attend treatment, the client shall be informed of the consequences of such a decision. A client shall be fully informed of the nature of the treatment, the benefits, and the available options. Written consent to proceed with treatment shall be obtained by an interdisciplinary review and the parent or legal guardian [~~parent's or legal guardian's~~].

(b) Assessment Standards for the Developmentally Delayed Client.

(1) - (4) (No change.)

(5) The assessment shall determine the client's level of functioning, appropriate treatment interventions, and facilitate the development of an individualized treatment plan. Assessments shall be individualized and efforts shall be made to acquire the following information:

(A) current level of functioning:

(i) - (ix) (No change.)

(x) support systems ([~~Current~~] Department of Aging and Disabilities [~~disabilities~~] and/or Department of State Health Services-Behavioral and Community Mental Health agency involvement, family involvement, social involvement);

(xi) - (xii) (No change.)

(B) (No change.)

(C) pertinent history:

(i) - (ii) (No change.)

(iii) past criminal behavior and/or sexually inappropriate[~~;~~] behavior;

(iv) - (v) (No change.)

(D) (No change.)

(6) - (8) (No change.)

(c) Treatment Standards for the Developmentally Delayed Client.

(1) - (6) (No change.)

(7) progress in treatment and ability shall be determined by the client integration of the components of treatment;

(8) - (22) (No change.)

(23) the licensee shall make every effort to collaborate with the victim's therapist in making decisions regarding communication, visits and reunification. Contact shall be arranged in a manner that ensures the child/victim safety first; [~~and~~]

(24) if reunification is deemed appropriate by the victim's therapist, the process shall be closely supervised. There shall be provisions for monitoring behavior and reporting rule violations. A victim's comfort and safety shall be assessed on a continuing basis; and[~~,~~]

(25) licensees shall be familiar with and adhere to §810.64(e) of this title (relating to Assessment and Treatment Standards for Adult Sex Offenders) and §810.65(j) of this title (relating to Assessment and Treatment Standards for Juveniles with Sexual Behavior Problems).

§810.68. Issues to Be Addressed in Treatment (Adults and Juveniles).

Licensees shall subscribe and adhere to the following tenets as they relate to and are applicable to each client:

(1) - (7) (No change.)

(8) Improving Primary Relationships. Treatment providers should involve the current partners or family members in treatment to assist the client in developing a functional lifestyle and maintain reciprocal relationships with an appropriate partner. Family members may be involved in the following but not limited to the assessment [~~Treatment providers should involve family members in~~], treatment, and addressing [~~address with juveniles~~] the juvenile's sex education needs, appropriate dating skills, and relationship skills.

(9) - (11) (No change.)

(12) Adjunct Therapies. Adjunct therapy may include, but is not limited to, substance abuse, anger management, stress management, social skills, sex education, or self-help groups[~~,~~] and shall primarily be used as adjuncts to a comprehensive treatment program in reducing the client's risk to re-offend. Other licensed mental health professionals may conduct adjunct therapies.

(13) After-Care Treatment. After-care treatment shall involve periodic "follow up" sessions to reinforce and assess maintenance of positive gains made during treatment. After-care treatment can be facilitated by involving the treatment group, supervision personnel, support systems, [~~system, the use of~~] polygraphs, phallometric assessment, and visual reaction time assessment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. CODE OF PROFESSIONAL ETHICS

22 TAC §810.91, §810.92

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The amendments affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.91. General.

Licensees shall constitute a professional discipline which shall have a membership committed to establishing and maintaining the highest level of professional standards related to the assessment and treatment of adult sex offenders and juveniles with sexual behavior problems. In order to maintain the highest ethical standard of service and consumer protection, licensees shall be committed to the following principles designed to ensure [~~earn~~] the maximum [~~greatest~~] level of public confidence.

§810.92. Code of Ethics.

(a) Professional Conduct. Licensees shall:

(1) (No change.)

(2) terminate services and facilitate a transfer of a client from treatment based on a complaint having been filed against the licensee by the client and/or the client's representative(s);

(3) [~~(2)~~] make an appropriate referral when a licensee cannot offer services to a client. Each licensee shall facilitate follow-up services for clients who transition from one program or one jurisdiction to another which includes a written summary of the assessment of risk, offending pattern, level of participation, relevant problems and treatment needs, client strengths and needs, support group, and recommendations;

(4) [~~(3)~~] perform their professional duties with the highest level of integrity and appropriate confidentiality within the scope of their statutory responsibilities;

(5) [~~(4)~~] not hesitate to seek assistance from other professional disciplines when circumstances dictate;

(6) [~~(5)~~] [~~shall~~] report unethical, incompetent, or dishonorable practices to the council;

(7) [~~(6)~~] refrain from using his or her professional relationship, to further personal, religious, political, or economic interests, other than customary professional fees;

(8) [~~(7)~~] have an obligation to engage in continuing education and professional growth;

(9) [~~(8)~~] refrain from diagnosing, treating, or making recommendations outside the scope of the licensee's competence;

(10) [~~(9)~~] be knowledgeable of legal statutes and scientific data relevant to the assessment and treatment of clients; and

(11) [~~(10)~~] display or provide in writing the address and telephone number of the council in all sites where sex offender treatment services are provided for the purpose of directing complaints to the council.

(b) Client Relationships. Licensees shall:

(1) - (2) (No change.)

(3) not engage in dual relationships with clients or former clients. Examples of dual relationships include, but are not limited to, the following: treatment of family members, close friends, employees, supervisors, supervisees, personal contacts outside the scope of treatment, contracting or subcontracting for work, and relationships outside of treatment such as business or social;

(4) - (11) (No change.)

(c) Confidentiality. Licensees shall:

(1) maintain records on each client for a period of no less than 10 years after the last date of service to the client. Client records shall include, at a minimum, client demographic information; release of confidential information signed by the client which clearly describes limits of confidentiality; test results from evaluations conducted by licensee, including test protocols; and monthly treatment reports which detail client attendance, treatment progress, and problematic behaviors which may contribute to risk for reoffense. Licensees shall maintain and store records on each client to ensure safety and confidentiality in accordance with the highest professional and legal standards including but not limited to HIPAA, the Texas Health and Safety Code, Chapter 611, and laws pertaining to victims rights (Federal Justice for All Act and Texas Code of Criminal Procedure, Chapter 56); licensees shall maintain the confidentiality of victims and shall not provide victim information to clients or others not specified in Occupations Code, Chapter 109, §109.051 and §109.052;

(2) - (8) (No change.)

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. CIVIL COMMITMENT GENERAL PROVISIONS

22 TAC §810.121, §810.122

STATUTORY AUTHORITY

The amendments are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The amendments affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.121. Introduction.

(a) - (b) (No change.)

(c) History. The legislature finds [~~has determined~~] that a small but extremely dangerous group of sexually violent predators exist and that those predators have [~~were being released from prison that had~~] a behavioral abnormality that is [~~was~~] not amenable to traditional mental illness treatment modalities and that makes the predators [~~were~~] likely to engage in repeated predatory acts of sexual violence. The legislature finds [~~determined~~] that the existing involuntary commitment provisions of Health and Safety Code, §571.001 et seq., Subtitle C, Title

7, are [Vernon's Ann. Tex. Const. Art. 1, §15a, were] inadequate to address the risk [to society] of repeated predatory behavior that sexually violent predators pose to society. [of the sexually violent predator.] The legislature further finds [determined] that treatment modalities for sexually violent predators are [were] different from the traditional treatment [psychotherapy] modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. The legislature finds [concluded] that a civil commitment procedure [standard] for the long-term [comprehensive and offense specific] supervision and treatment of sexually violent predators is necessary and in the interest of the state. [was necessary for the protection of the citizens of the State of Texas (Health and Safety Code, Chapter 841).]

§810.122. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (3) (No change.)

[(4) Child safety zone--An area as defined in Code of Criminal Procedure, Art. 42.12, §13B; Health and Safety Code, §841.134; and Texas Government Code §508.187.]

[(5) Civil Commitment--The civil commitment of a person adjudged to be a sexually violent predator and committed to the outpatient sexual violent predator treatment program (OSVPTP).]

(4) [(6)] [Civil Commitment] Case Manager--A person employed by or under contract with the council to perform duties related to outpatient treatment and supervision of a person committed under this chapter. [the supervision, coordination and monitoring of the person committed to the outpatient sexually violent predator treatment program.]

[(7) Civil Commitment Treatment Provider--A licensed sex offender treatment provider under contract with the council to conduct assessments, provide intensive treatment, conduct treatment planning, and to assist the Civil Commitment Case Manager in supervising the sexually violent predator.]

(5) [(8)] Council--The Council on Sex Offender Treatment.

[(9) Global Positioning Satellite (GPS) Tracking--Technology that incorporates global positioning satellite tracking and electronic radio frequency.]

(6) [(10)] [Interagency] Case Management Team--All professionals involved in the assessment, treatment, supervision, monitoring, residential housing of the client, or other approved professionals. The case manager shall act as the chairperson of the team.

(7) [(11)] Multidisciplinary Team (MDT)--Members of the Council on Sex Offender Treatment (two), Texas Department of Criminal Justice (one), Texas Department of Criminal Justice-Victim Service Division (one), Texas Department Public Safety (one), and Texas Department of State Health Services-Community Mental Health Division (two). The team assesses whether a person is a repeat sexually violent offender and whether the person is likely to commit a sexually violent offense after release or discharge; gives notice of it's findings to the Texas Department of Criminal Justice or to the Department of State Health Services-Community Mental Health Division; and recommends to either agency that the person be assessed for a behavioral abnormality.

[(12) Penile Plethysmograph (PPG)--A diagnostic method to assess sexual arousal by measuring the blood flow (tumescence) to the penis during the presentation of sexual stimuli in a controlled setting by providing the identification of a clients' physiological arousal in response to sexual stimuli (audio/visual).]

[(13) Polygraph Examination (Clinical)--The employment of any instrumentation complying with the required minimum standards of the Texas Polygraph Examiner's Act and used for the purpose of measuring the physiological changes associated with deception. The following are descriptions of the four types of polygraphs utilized.]

[(A) Instant Sexual Offense Polygraph--addresses the offense of conviction in conjunction with the official version;]

[(B) Sexual History Polygraph--addresses the complete sexual history of the client up to the instant offense;]

[(C) Maintenance Polygraph--addresses compliance with conditions of supervision and treatment; and]

[(D) Monitoring Polygraph--addresses whether the client has committed a "new" sexual offense.]

[(14) Polygraph Examiner--A person with a current license approved by the Texas Polygraph Examiner's Board and who meets minimum criteria to be listed by the Joint Polygraph Committee on Offender Testing (JPCOT) for polygraphing adult sex offenders and juveniles with sexual behavior problems.]

(8) [(15)] Predatory Act--An act directed toward individuals, including family members, for the primary purpose of victimization.[that is committed for the purpose of victimization and that is directed toward:]

[(A) a stranger;]

[(B) a person of casual acquaintance with whom no substantial relationship exists; or]

[(C) a person with whom a relationship has been established or promoted for the purpose of victimization.]

[(16) Repeat Sexually Violent Offender--A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:]

[(A) the person:]

[(i) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;]

[(ii) enters a plea of guilty or nolo contendere to a sexually violent offense in return for a grant of deferred adjudication;]

[(iii) is adjudged not guilty by reason of insanity for a sexually violent offense; or]

[(iv) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Family Code, §54.04(d)(3) or (m); and]

[(B) after the date on which under Health and Safety Code, §841.003(b)(1), the person is convicted, receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person:]

[(i) is convicted, but only if the sentence for the offense is imposed; or]

[(ii) is adjudged not guilty by reason of insanity.]

[(17) Residential Facility--A community residential facility, or halfway house, located in the State of Texas, and under contract with the council.]

(9) [(18)] Sexually Violent Offense--

(A) an offense under the Penal Code, §§21.02, 21.11(a)(1), 22.011, or 22.021;

(B) an offense under the Penal Code, §20.04(a)(4) [30.04(a)(4)], if the defendant committed the offense with the intent to violate or abuse the victim sexually;

(C) an offense under the Penal Code, §30.02, if the offense is punishable under subsection (d) of that section and the defendant committed the offense with the intent to commit an offense listed in subparagraphs (A) or (B) of this paragraph;

(D) an offense under Penal Code, §19.02 or §19.03, that, during the guilt or innocence phase or the punishment phase for the offense, during the adjudication or disposition of delinquent conduct constituting the offense, or subsequently during a [the] civil commitment proceeding under Health and Safety Code, Chapter 841, Subchapter D, is determined beyond a reasonable doubt to have been based on sexually motivated conduct;

(E) an attempt, conspiracy, or solicitation, as defined by the Penal Code, Chapter 15, to commit an offense listed in subparagraph (A), (B), (C), or (D) of this paragraph;

(F) an offense under prior state law that contains elements substantially similar to the elements of an offense listed in subparagraph (A), (B), (C), (D), or (E) of this paragraph; or

(G) an offense under the law of another state, federal law, or the Uniform Code of Military Justice that contains elements substantially similar to the elements of an offense listed in subparagraph (A), (B), (C), (D), or (E) of this paragraph.

(10) [(19)] Sexually Violent Predator (SVP)--A person is a sexually violent predator for the purpose of this chapter if the person: is a repeat sexually violent offender; and suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. [; is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses.]

[(20) Supervision, Treatment, and GPS Requirements--The requirements whereby a person agrees to participate and comply with the conditions of the Outpatient Sexually Violent Predator Treatment Program (OSVPTP).]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. CIVIL COMMITMENT

22 TAC §§810.151 - 810.153

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeals affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.151. Administration of the Act.
§810.152. Civil Commitment of Sexually Violent Predators.
§810.153. Outpatient Treatment and Supervision Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §§810.151 - 810.153

STATUTORY AUTHORITY

The new sections are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new sections affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.151. Administration of the Act.

The Council on Sex Offender Treatment (council) is responsible for providing appropriate and necessary treatment and supervision through the case management system. The council shall hire program specialists and/or contract for the services of case managers, treatment providers, global positioning tracking providers, biennial examination experts, transportation providers, and residential housing providers. The council by rule shall administer this chapter. Rules adopted by the council under this section must be consistent with the purposes of this chapter. The council by rule shall develop standards of care and case management for persons committed under this chapter.

§810.152. Civil Commitment of Sexually Violent Predators.

If at a trial conducted under Health and Safety Code, Chapter 841, Subchapter D, the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for outpatient treatment and supervision to be coordinated by the case manager. The commitment order is effective immediately on entry of the order, except that the outpatient treatment and supervision begins on the person's release from a secure correctional facility or discharge from a state hospital and continues until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence. At any time after entry of a commitment, the case manager may provide to the person instruction regarding the requirements associated with the order, regardless of whether the person is incarcerated at the time of the instruction.

§810.153. Outpatient Treatment and Supervision Program.

The council by rule shall develop standards of care and case management for persons committed under this chapter.

(1) The council shall approve and contract for the provision of a treatment plan for the committed person to be developed by the treatment provider. A treatment plan may include the monitoring of the person with a polygraph or plethysmograph. The treatment provider may receive annual compensation in an amount not to exceed $6,000 for providing the required treatment.

(2) The case manager shall provide supervision to the person. The provision of supervision shall include a tracking service and, if required by court order, supervised housing.

(3) The council shall enter into appropriate memoranda of understanding with the Texas Department of Public Safety for the provision of a tracking service and for assistance in the preparation of criminal complaints, warrants, and related documents and in the apprehension and arrest of a person.

(4) Notwithstanding paragraph (3) of this section or any other provision of this subchapter, the council shall provide through the case management system any supervision or tracking service required under this chapter for persons residing in Dallas, Harris or Tarrant County. The council shall provide the tracking service under this subsection through two employees of the Department of State Health Services. Any tracking personnel used by the department for purposes of this chapter must be approved by the council or the council's designee.

(5) If the equipment necessary to implement the tracking service is available through a contract entered into by the comptroller, the Department of Public Safety or the council, as appropriate, shall acquire that equipment through that contract.

(6) The council shall enter into appropriate memoranda of understanding for any necessary supervised housing. The council shall reimburse the applicable provider for housing costs under this section. The committed person may not be housed for any period of time in a mental health facility, state school, or community center, unless the placement results from a commitment of the person to that facility, school, or center by governmental action.

(7) The case manager shall coordinate the outpatient treatment and supervision required by this chapter, including performing a periodic assessment of the success of that treatment and supervision. The case manager shall make timely recommendations to the judge on whether to allow the committed person to change residence or to leave the state and on any other appropriate matters. The case manager shall provide a report to the council, semiannually or more frequently as necessary, which must include: any known change in the person's status that affects proper treatment and supervision; and any recommendations made to the judge.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Liles Arnold
Chair
Council on Sex Offender Treatment
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SUBCHAPTER G. CIVIL COMMITMENT PROGRAM SPECIALIST AND/OR CASE MANAGER AND TREATMENT PROVIDER DUTIES AND RESPONSIBILITIES

22 TAC §§810.181 - 810.183

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeals affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.181. General.

§810.182. Civil Commitment Program Specialist and/or Case Manager.

§810.183. Civil Commitment Treatment Provider.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. CIVIL COMMITMENT REVIEW

22 TAC §810.211

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeal affects Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the section implements Government Code, §2001.039.

§810.211. Biennial Examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §810.211

STATUTORY AUTHORITY

The new section is authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new section affects Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the section implements Government Code, §2001.039.

§810.211. Biennial Examination.

(a) A person committed under Health and Safety Code, §841.081, shall receive a biennial examination. The council shall contract for an expert to perform the examination.

(b) In preparation for a judicial review conducted under Health and Safety Code, §841.102, the case manager shall provide a report of the biennial examination to the judge. The report must include consideration of whether to modify a requirement imposed on the person under this chapter and whether to release the person from all requirements imposed on the person under this chapter. The case manager shall provide a copy of the report to the council.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. PETITION FOR RELEASE

22 TAC §810.241, §810.242

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeals affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.241. Authorized Petition for Release.

§810.242. Unauthorized Petition for Release.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §810.241, §810.242

STATUTORY AUTHORITY

The new sections are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new sections affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.241. Authorized Petition for Release.

If the case manager determines that the committed person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence, the case manager shall authorize the person to petition the court for release.

§810.242. Unauthorized Petition for Release.

On a person's commitment and annually thereafter, the case manager shall provide the person with written notice of the person's right to file with the court and without the case manager's authorization a petition for release.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. MISCELLANEOUS PROVISIONS

22 TAC §§810.271 - 810.275

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Council on Sex Offender Treatment or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The repeals affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.271. Release and Exchange of Information.

§810.272. Effect of Subsequent Commitment or Confinement on the Order of Commitment.

§810.273. Certain Expert Testimony not Required for Civil Commitment of the Sexually Violent Predator.

§810.274. Criminal Penalty.

§810.275. Immunity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §§810.271 - 810.273

STATUTORY AUTHORITY

The new sections are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new sections affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.271. Release and Exchange of Information.

To protect the public and to enable an assessment or determination relating to whether a person is a sexually violent predator, any entity that possesses relevant information relating to the person shall release the information to an entity charged with making an assessment or determination under this chapter.

(1) To protect the public and to enable the provision of supervision and treatment to a person who is a sexually violent predator, any entity that possesses relevant information relating to the person shall release the information to the case manager.

(2) On the written request of any attorney for another state or for a political subdivision in another state, the Texas Department of Criminal Justice, the council, a service provider contracting with one of those agencies, the multidisciplinary team, and the attorney representing the state shall release to the attorney any available information relating to a person that is sought in connection with an attempt to civilly commit the person as a sexually violent predator in another state.

(3) To protect the public and to enable an assessment or determination relating to whether a person is a sexually violent predator or to enable the provision of supervision and treatment to a person who is a sexually violent predator, the Texas Department of Criminal Justice, the council, a service provider contracting with one of those agencies, the multidisciplinary team, and the attorney representing the state may exchange any available information relating to the person.

(4) Information subject to release or exchange under this section includes information relating to the supervision, treatment, criminal history, or physical or mental health of the person, as appropriate, regardless of whether the information is otherwise confidential and regardless of when the information was created or collected. The person's consent is not required for release or exchange of information under this section.

(5) Personal victim information including a home address, home telephone number, and social security number that identifies the victim(s) of a person subject to a civil commitment proceeding under this Act is privileged from discovery by that person.

§810.272. Council Appointment of Multidisciplinary Members.

The council shall appoint members of the council and alternates, to serve as member(s) of the Multidisciplinary Team (team) as defined in the Health and Safety Code, §841.022. The council member(s) or designee(s) who serve on the team shall keep the council informed of the actions taken by the team by providing the council's Executive Director with periodic reports as required.

§810.273. Cost of Tracking Service.

Notwithstanding Health and Safety Code, §841.146(c), a civilly committed person who is not indigent is responsible for the cost of the tracking service required by Health and Safety Code, §841.082, and monthly shall pay to the council the amount that the council determines will be necessary to defray the cost of operating the service with respect to the person during the subsequent month. The council immediately shall transfer the money to the appropriate service provider.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. CRIMINAL BACKGROUND CHECK OF POTENTIAL EMPLOYEES

22 TAC §§810.281 - 810.283

STATUTORY AUTHORITY

The new sections are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new sections affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.281. Access to Criminal History Records.

The council is authorized to obtain information from the Texas Department of Public Safety or the Federal Bureau of Investigation about a conviction or deferred adjudication that relates to an applicant seeking employment with the Department of State Health Services. The council is authorized to obtain a criminal history record from any law enforcement agencies. The criminal history record information received under this section is for the exclusive use of the council and is privileged and confidential. The criminal history record information shall not be released or otherwise disclosed to any person or agency except on court order or with the written consent of the applicant.

§810.282. Records.

All other records of the council that are not made confidential by other law are open to inspection by the public during regular office hours. The content of the criminal background checks on each potential applicant are not public records and are confidential. Unless expressed in writing by the chairperson of the council, the executive director and the executive director's designee are the only staff authorized to have daily access to the criminal history records. These records will be maintained in separate files and not in the licensee files.

§810.283 Destruction of Criminal History Records.

The council shall destroy conviction/adjudication information relating to a person after the council makes a decision on the eligibility of the applicant. The council shall destroy the information provided by the Texas Department of Public Safety, the Federal Bureau of Investigation or any other law enforcement agency. In the event that information is collected online, all files created will be destroyed in the aforementioned timeframe.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER L. EARLY TERMINATION FOR CERTAIN PERSONS' OBLIGATION TO REGISTER

22 TAC §§810.301 - 810.308

STATUTORY AUTHORITY

The new sections are authorized under Texas Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter; and Texas Occupations Code, §110.159(a)(1), which requires the council to charge and collect reasonable fees in amounts necessary to cover the costs of administering this chapter; and Texas Health and Safety Code, §841.141, which provides the council with the authority to adopt rules consistent with the purposes of the chapter.

The new sections affect Texas Occupations Code, Chapter 110; and Texas Health and Safety Code, Chapter 841. Review of the sections implements Government Code, §2001.039.

§810.301. Introduction.

(a) General. The provisions of this subchapter govern the procedures relating to the deregistration of individuals on the public registry for sex offenders in the State of Texas.

(b) Construction. These sections cover definitions, criteria for deregistration; guidelines for conducting deregistration assessments; and, the due process for determining if a registrant may deregister.

§810.302. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Code of Criminal Procedure, Chapter 62.401 et seq. Termination of Certain Persons' Obligation to Register.

(2) Contact with Registrant: Clinical Interview--Face to face interview between the Licensed Sex Offender Treatment Provider and the Registrant.

(3) Deregistration--The early termination of an individual's obligation to register.

(4) Deregistration Candidate--An individual required to register who is undergoing a deregistration evaluation.

(5) Deregistration Criteria--The criteria established by the council to determine if a registrant is eligible for early termination of the obligation to register.

(6) Evaluation Specialist--A licensed sex offender treatment provider who is approved by the council to conduct deregistration evaluations.

(7) Instant Offense--The sexual offense that resulted in the registrant being required to listed or included on the sex offender registry.

(8) Public Registry--The public registry of sex offenders in the State of Texas which is maintained by the Texas Department of Public Safety.

(9) Registrant--An individual who is required under Code of Criminal Procedure, Chapter 62, in the State of Texas.

§810.303. Administration of the Act.

The council is responsible for providing the appropriate and necessary guidelines for deregistration including identifying who can deregister, the method where by registrants are evaluated for deregistration and the due process that must be followed to attain deregistration.

§810.304. Deregistration Eligibility.

The council shall establish criteria to determine an individual's eligibility for early termination from the obligation to register. The council shall publish a list of eligibility criteria. Prior to participating in a deregistration evaluation, the registrant must obtain approval from the council that he or she is eligible for deregistration.

§810.305. Deregistration Decision Criteria.

The council shall establish deregistration evaluation criteria to determine the risk level of the registrant.

§810.306. Evaluation Specialist.

The council shall contract with licensed sex offender treatment providers to provide deregistration evaluation services.

§810.307. Deregistration Methodology.

The Deregistration Evaluation Specialist shall submit the candidate's deregistration evaluation report to the council. The council shall review the report and determine if the report conforms to council criteria. The council shall certify reports that meet council criteria and send the certified report back to the attorney.

§810.308. Protocol Compliance.

The council or its designee shall review each candidate's application and deregistration evaluation report in order to insure that these documents are in compliance with approved methodology and procedures. The council or its designee shall insure that all established requirements have been met by the candidate prior to approving the candidate to undergo a deregistration evaluation. The council or its designee shall also ensure that established deregistration evaluation criteria have been met prior to providing the candidate with the written evaluation report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER B. COASTAL EROSION PLANNING AND RESPONSE

31 TAC §15.41, §15.44

The General Land Office (GLO) proposes amendments to Chapter 15, Subchapter B concerning Coastal Erosion Planning and Response, pursuant to authority under the Coastal Erosion Planning and Response Act, §§33.601 - 33.613, Texas Natural Resources Code (CEPRA), including §15.41 (relating to Evaluation Process for Coastal Erosion Studies and Projects) and §15.44 (relating to Beneficial Use of Dredged Materials). The proposed amendments result from the quadrennial rule review of Chapter 15, Subchapter B, required by Texas Government Code §2001.039 and implement statutory changes to CEPRA made during the 81st Legislative Session.

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENTS.

The CEPRA requires the Land Office to implement a program of coastal erosion avoidance, remediation, and planning. H.B. 2387, 81st Legislature, Regular Session amended §33.603, Texas Natural Resources Code, by amending subsection (b) to add a new subsection (b)(12) to allow the use of CEPRA funds for buyouts of property on a public beach. New subsection (b)(13) was also added to allow the use of CEPRA funds for reimbursement of the cost of acquisition of property necessary for the construction, reconstruction, maintenance, widening, or extension of an erosion response project. H.B. 2387 also amended §33.603, Texas Natural Resources Code, by amending subsection (h) to allow the Commissioner of the GLO to determine the percentage of the shared project cost a qualified project partner must pay for a project undertaken pursuant to

subsection (b)(11) for removal of debris, as well as removal and relocation of structures from the public beach pursuant to subsection (b)(12) and for projects that include the purchase of property necessary for an erosion response project pursuant to subsection (b)(13). H.B. 2387 also amended §33.603, Texas Natural Resources Code, by amending subsection (f) to allow the Commissioner of the GLO to undertake at least one erosion response project without requiring a qualified project partner to pay a portion of the shared project costs, provided that the total cost of the projects that do not have a cost share requirement does not exceed one-half of the amount appropriated to the GLO for coastal erosion planning and response. The amendments to §15.41 are proposed to implement CEPRA as amended by H.B. 2387.

§15.41. Evaluation Process for Coastal Erosion Studies and Project.

Subsection (a)(1)(A)(xiii)(V) is amended to delete the reference to "large scale" in describing an erosion response project for which funding is sought without a cost share requirement in accordance with Texas Natural Resources Code §33.603 consistent with changes made by H.B. 2387. Subsection (a)(1)(A)(xiii)(VI) is amended to add references to projects for which funding is sought, including the purchase of property located on a public beach, or the acquisition of property necessary for the construction, reconstruction, maintenance, widening, or extension of an erosion response project in accordance with subsection (b)(12) and (13) of Texas Natural Resources Code as amended by H.B. 2387. Subsection (a)(1)(B)(ii) concerning the address for mailing project goal summaries is amended to reflect a reorganization of the Coastal Resources Program Area of the GLO. Subsection (a)(1)(C)(xi) is amended to update the statutory reference for criteria related to structural shoreline protection projects on or landward of a public beach to reflect the renumbering of Texas Natural Resources Code §33.603(b)(12) to (b)(14) as amended by H.B. 2387. Subsection (a)(2)(E) is amended to delete a reference to "large scale beach nourishment" in describing an erosion response project for which funding is sought without a cost share requirement and to contemplate the undertaking of more than one such erosion response project, in accordance with Texas Natural Resources Code §33.603(f) as amended by H.B. 2387. Subsection (a)(2)(E)(i) is amended to change the limitation on the number and total amount of costs for projects without a cost share requirement from one-third to one-half of the total amount appropriated to the GLO for coastal erosion planning and response for the state fiscal biennium in which funding is sought, consistent with Texas Natural Resources Code §33.603(f) as amended by H.B. 2387. Subsection (a)(2)(E)(ii) and (iv) are also amended to change the limitation on the number of projects without a cost share requirement consistent with Texas Natural Resources Code §33.603(f) as amended by H.B. 2387 and to delete unnecessary text. Subsection (b) is added to clarify that a project selected for emergency funding that is not included in the biennial evaluation process should be evaluated using the same criteria outlined in the section other than the submission deadlines.

§15.44. Beneficial Use of Dredged Materials.

Section 15.44(d) and (f) are amended to update references to U.S. Army Corps of Engineers publications used for guidance in determining the suitability and practicality of dredged material for beach placement and to update the mailing address for requesting copies of those publications to reflect a reorganization of the Coastal Resources Program Area of the GLO.

FISCAL AND EMPLOYMENT IMPACTS.

Helen Young, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amended sections as proposed are in effect there will be no fiscal implications for state government as a result of enforcing or administering the amended sections because the GLO is not required to fund coastal erosion response projects unless funds are appropriated by the Legislature for that purpose. Ms. Young has also determined that for the first five-year period that the proposed rulemaking is in effect there will be fiscal implications for local governments.

In 2006 the Commissioner implemented a voluntary house relocation program for houses on the public beach providing for reimbursement of removal and relocation expenses up to $50,000. However, at that time Texas Natural Resources Code §33.603(h) did not allow the use of CEPRA funds for the purchase of real property. Some property owners were reluctant to accept reimbursement of removal and relocation expenses for houses on the public beach without compensation for the real property upon which the house was located that had become subject to the public beach easement due to erosion. Texas Natural Resources Code §33.603, as amended by H. B. 2387 allows the GLO to provide a more comprehensive voluntary removal program. The GLO is implementing the authority granted for reimbursing local governments for the acquisition of property located on a public beach by providing funding from money appropriated in H.B. 4586 (Acts 2009, 81st Legislature, Chapter 1302) for the non-federal match for Federal Emergency Management Administration (FEMA) hazard mitigation grants. Those FEMA grants involve the voluntary purchase of property where houses have become located on the public beach as a result of Hurricane Ike.

Local government tax revenue may be affected by the removal of these properties from local tax rolls. Property values as well as tax rates vary widely along the coast. Property values in the subject areas of the hazard mitigation grants range from less than $100,000 to over $500,000. Tax rates vary from 55.86 cents per $100 valuation in Galveston County and 49.4 cents per $100 valuation for the City of Galveston. Brazoria County has a tax rate of 33 cents per $100 valuation and the Village of Surfside Beach has a tax rate of approximately 35.24 cents per $100 valuation. For a typical house in the City of Galveston valued at $300,000 the fiscal impact to the City would be a reduction in revenue of $1,482 each year and the fiscal impact to Galveston County would be $1,675.80 each year. For a similarly valued house in Surfside Beach, the impact would be $1,057.20 each year and the impact to Brazoria County would be $990 each year. The total fiscal impact to the local jurisdictions would depend on the valuation of individual properties and the total number of houses involved in the buyouts. Some of the fiscal impacts to local governments may be offset by the preservation of the value of properties adjacent to and further landward of erosion response projects such as beach nourishment and dune restoration projects that are facilitated by removal of houses from the public beach. The local government may also benefit from increased tourist revenue that may be sustained by improved beaches resulting from such beach nourishment projects. Finally, the buyout program is a voluntary program, sponsored by local governments.

PUBLIC BENEFIT.

In areas of the coast where erosion response projects are needed to protect critical public infrastructure, the existence of structures on the public beach has prevented or delayed the undertaking of erosion response projects such as beach nourishment projects, dune restoration projects, or shore protection projects due to the existence of lengthy unresolved litigation related to the structures. In such circumstances where acquisition of the property is necessary for the construction of an erosion response project, the ability to reimburse qualified project partners for the purchase of real property may facilitate such projects. In addition, the flexibility for determining the level of the cost share requirement for the qualified project partner afforded to the Commissioner by H.B. 2387 as implemented by these amendments will also facilitate new erosion response projects, including erosion response structures, dune restoration projects, and beach nourishment projects. Ms. Young has determined that for each year of the first five-year period the proposed rulemaking is in effect, the public benefit from such erosion response projects include: reduction in losses to public property from storm damage and erosion; preserving property value in proximity to the project areas; generating additional property tax revenue from property protected by projects seaward of the property; and sustaining visitation and tourist spending related to the increased capacity of beaches improved with nourishment projects. In addition, the hazard mitigation projects related to the buyout of houses on the public beach and the reduction in damage to properties further landward will contribute to public health and safety by removing those hazards and may qualify the community for better ratings under FEMA regulations which benefit property owners by reducing flood insurance premiums.

Ms. Young has determined that there will be no additional cost of compliance for small or large businesses or individuals required to comply with the rules as amended. These rules and their enabling statute apply to coastal erosion response projects undertaken by the GLO in conjunction with qualified project partners, including federal agencies, other state agencies and local governments. The GLO has also determined that an economic impact statement and regulatory flexibility analysis on these proposed amendments are not required by Government Code, §2006.002, because the proposed amendments do not have a material adverse economic effect on small businesses.

EMPLOYMENT IMPACT.

The GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an employment impact statement pursuant to the Government Code, §2001.022.

ENVIRONMENTAL REGULATORY ANALYSIS.

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 15, Subchapter B are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in CEPRA relating to coastal erosion studies or projects undertaken in cooperation with a qualified project partner under an agreement with the Commissioner of the GLO.

CONSISTENCY WITH TEXAS COASTAL MANAGEMENT PROGRAM (CMP).

The proposed rulemaking is not subject to the Texas Coastal Management Program (CMP), Texas Natural Resources Code §33.2053 and 31 TAC §505.11, relating to the Actions and Rules Subject to the Coastal Management Program. Individual erosion response projects undertaken in compliance with these rules may be subject to the CMP, and consistency with the CMP is determined at the appropriate stage of project planning.

TAKINGS ANALYSIS.

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The GLO has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private real property interests.

REQUEST FOR PUBLIC COMMENTS.

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY.

The amendments are proposed under the Texas Natural Resources Code, §33.602(c) that provides the Commissioner of the General Land Office with the authority to adopt rules to implement Subchapter H, Chapter 33, Texas Natural Resources Code, concerning coastal erosion.

STATUTORY SECTIONS AFFECTED.

Texas Natural Resources Code, §§33.601 - 33.605 are affected by the proposed amendment.

§15.41. Evaluation Process for Coastal Erosion Studies and Projects.

(a) The General Land Office (Land Office) will evaluate potential projects proposed by potential project partners for funding from the coastal erosion response account (Account) based on a two-stage evaluation process as described in this section, including an initial evaluation of project goal summaries followed by a further evaluation of preferred alternatives.

(1) Initial evaluation of project goal summaries submitted to the Land Office by potential project partners.

(A) A potential project partner seeking funds from the Account must submit a project goal summary to the Land Office no later than July 1 immediately preceding the state fiscal biennium in which funding is sought; provided that the Land Office in its discretion may accept a project summary that will address an emergency situation after July 1. The project goal summary must include the following:

(i) the name of the entity that will be the potential project partner and the name, mailing address, email address, facsimile number, and telephone number of the person who will represent the potential project partner and be the primary point of contact with the Land Office;

(ii) the location and geographic scope of the erosion problem;

(iii) a description of the erosion problem and the severity of erosion in the area;

(iv) a description of how the project will lessen the negative economic impacts of the erosion problem;

(v) a description of how the project will benefit the public and private infrastructure, resources, and property that have been impacted or threatened by erosion;

(vi) the natural resource impacts of erosion in the area;

(vii) the estimated cost to complete the erosion response project;

(viii) whether the project will incorporate the beneficial use of dredged materials;

(ix) potential public and private cosponsors and sources of funding with an estimated percentage of the project to be funded with funds from a source other than the Account;

(x) whether the potential partner can make a binding funding commitment to meet the required percentage of the shared project cost;

(xi) a description of an emergency erosion situation the project is intended to address, if any;

(xii) the desired outcome or goals of the project for which funding is sought from the Account;

(xiii) a description of the type of project for which funding is sought from the Account, including an identification of the project as:

(I) a beach nourishment project on a public beach or bay shore with a 25% cost-sharing requirement;

(II) a marsh restoration project with a 40% cost-sharing requirement;

(III) a bay shoreline protection project other than beach nourishment with a 40% cost-sharing requirement;

(IV) any other coastal erosion response study or project with a 40% cost-sharing requirement;

(V) a project for which funding is sought from the Account is an erosion response [~~a large-scale~~] project without a shared project cost requirement in accordance with Texas Natural Resources Code, §33.603(f);

(VI) a project for removal of debris or structures, [~~or~~] relocation of structures from the public beach, including the purchase of property located on a public beach, or the acquisition of property necessary for the construction, reconstruction, maintenance, widening, or extension of an erosion response project with a cost-sharing requirement to be determined by the Land Office, in accordance with subsections [~~Subsections~~] (b)(11) - (13) and (h) of Texas Natural Resources Code, §33.603;

(VII) a structural shoreline protection project on or landward of a public beach that utilizes innovative technologies, designed or engineered to minimize beach scour, in accordance with Texas Natural Resources Code, §33.603(b)(12); or

(VIII) an erosion response demonstration project in accordance with Texas Natural Resources Code, §33.603(g).

(xiv) whether a sand source has been identified by the potential project partner for a beach nourishment project;

(xv) a description of how the project is consistent with the policies of the Coastal Coordination Council for shore protection projects promulgated in 31 TAC §501.26(b) (relating to Policies for Construction in the Beach/Dune System), if the project involves structural shoreline protection on or landward of a public beach; and

(xvi) whether the potential partner seeks to manage the project or requests that the Land Office manage the project.

(B) The Land Office will accept project goal summaries by:

(i) email sent to coastalprojects@glo.state.tx.us;

(ii) mail sent to the General Land Office, Attn: Director, Planning, Permitting and Technical Services Division, Coastal Resources Program Area, [~~Coastal Stewardship Division,~~] P.O. Box 12873, Austin, TX 78711-2873; or

(iii) fax sent to (512) 475-0680.

(C) The Land Office will evaluate project goal summaries received based on the following criteria:

(i) the feasibility and cost-effectiveness of the proposed project;

(ii) the economic impacts of erosion in the area of the proposed project;

(iii) the effect of the proposed project on public infrastructure or resources threatened by erosion;

(iv) the effect of the proposed project on natural resources threatened by erosion;

(v) the effect of the proposed project on private property threatened by erosion;

(vi) if the project is located within the jurisdiction of a local government that administers a beach/dune program:

(I) whether the local government is adequately administering its duties under the Open Beaches Act (Texas Natural Resources Code, Chapter 61) and the Dune Protection Act (Texas Natural Resources Code, Chapter 63); and

(II) whether the local government has implemented an Erosion Response Plan for reducing public expenditures due to erosion and storm damage losses established under Texas Natural Resource Code, §33.607, and §15.17 of this title (relating to Local Government Erosion Response Plans);

(vii) whether the project will provide for beneficial use of beach-quality sand dredged in constructing and maintaining navigation inlets and channels of the state;

(viii) whether funding can be leveraged with sources other than the Account;

(ix) whether the potential project partner has already made or received a binding commitment to fund all or a portion of a given project;

(x) if the project involves the construction or retrofitting of dams, jetties, groins or other structural impoundments, whether such structures will be designed with a sediment bypass system; and

(xi) if the project involves structural shoreline protection on or landward of a public beach, whether such project uses innovative technologies designed or engineered to minimize beach scour in accordance with Texas Natural Resources Code, §33.603 (b)(14) [~~§33.603 (b)(12)~~] and is consistent with the policies of the Coastal Coordination Council promulgated in 31 TAC §501.26(b) of this title (relating to Policies for Construction in the Beach/Dune System).

(D) After evaluation of proposed projects according to the criteria detailed in subparagraph (C) of this paragraph, the Land Office will further evaluate project goal summaries received based on the following priority criteria:

(i) the relative severity of erosion in each area;

(ii) whether the proposed project will address an emergency erosion situation in the area;

(iii) the needs in other critical coastal erosion areas;

(iv) whether federal and local governmental financial participation in the project is maximized;

(v) whether financial participation by private beneficiaries of the project is maximized;

(vi) whether the project achieves efficiencies and economies of scale;

(vii) whether funding the proposed project will contribute to balance in the geographic distribution of benefits for coastal erosion response projects in Texas that are proposed or have received funding from the Account; and

(viii) the cost of the proposed project in relation to the amount of money available in the Account.

(E) The Land Office will conduct the initial evaluation in consultation and coordination with the potential project partner, as deemed necessary by the Land Office. Based on the initial evaluation, the Land Office will designate proposed projects as either priority projects or alternative projects.

(i) If, as a result of the initial evaluation, the Land Office designates a potential project as an alternate project, the potential project partner will be notified in writing. The Land Office will retain the project goal summary and may reevaluate it if future conditions warrant funding the project in the current state fiscal biennium. The project goal summary must be resubmitted by the potential project partner for consideration for funding in a subsequent state fiscal biennium.

(ii) If the Land Office's initial evaluation results in a designation of a proposed project as a priority project, the Land Office may invite the potential project partner to continue to work cooperatively with the Land Office by becoming a qualified project partner.

(2) Evaluation of preferred alternatives with qualified project partners for priority projects.

(A) The Land Office may require the potential project partner for a priority project to enter into a project cooperation agreement before continuing the evaluation process. Upon entering into a project cooperation agreement, the potential project partner will become a qualified project partner. The Land Office may require a qualified project partner to cooperatively evaluate alternatives for addressing the erosion problem(s) identified in the project goal summary of a priority project.

(B) The project cooperation agreement with the qualified project partner may explicitly define the activities to be undertaken by the Land Office and the qualified project partner in the evaluation of alternatives. Funds from a source other than the Account expended by a qualified project partner in conformance with the project cooperation agreement can be used to offset the qualified project partner's cost-sharing requirement. The Land Office may, at its sole discretion, fund studies or activities that are part of the alternatives-evaluation process.

(C) During the alternatives-evaluation process, the Land Office will evaluate projects based on the following criteria:

(i) the feasibility and cost-effectiveness of preferred alternative projects in meeting the goals of the project goal summary; and

(ii) whether the potential or qualified project partner has already made or received a binding commitment to fund all or a portion of a given project.

(D) The Land Office will determine whether a potential or qualified project partner should receive funds from the Account based on the final prioritization of preferred alternatives according to the considerations detailed in subparagraph (C) of this paragraph.

(E) Each state fiscal biennium the Land Office may determine that at least one [~~a large-scale beach nourishment~~] project [~~on a public beach~~] designated as a priority project will be undertaken by the Land Office without requiring a qualified project partner to pay a portion of the shared project cost as provided in Texas Natural Resources Code, §33.603(f). In addition to the considerations detailed in subparagraph (C) and (D) of this paragraph, the Land Office may consider the following factors in determining whether to fund erosion response projects [~~a large-scale project~~] without a cost share requirement:

(i) whether the total cost of the projects [~~project~~] exceeds one-half [~~one-third~~] of the total amount appropriated to the Land Office for coastal erosion planning and response for the state fiscal biennium in which funding is sought;

(ii) whether a sand source for the projects [~~project~~] has been identified by the qualified project partner in the project goal summary;

(iii) the relative amount of funding available to the qualified project partner from sources other than the Account; and

(iv) the potential impact of the projects [~~project~~] on coastal erosion in relation to the total estimated cost of the projects [~~project~~]. [~~Response Account~~]

(b) The Land Office may use the criteria set forth in this section, other than submission deadlines, in selecting a project for funding that will address an emergency situation and is not included in the biennial evaluation process.

§15.44. Beneficial Use of Dredged Materials.

(a) If a project receives funds from the coastal erosion response account, material dredged in constructing and maintaining navigation inlets and channels of the state shall be placed on eroding beaches or used to restore eroding wetlands wherever practicable.

The Land Office, in consultation with a qualified project partner, shall evaluate the practicality and suitability of proposed beneficial use of dredged material in accordance with this section and shall consider relative cost of the material and the sediment composition.

(b) A portion of the shoreline which is experiencing an historical erosion rate of greater than two feet per year based on the published data of the University of Texas at Austin Bureau of Economic Geology, is considered an eroding area for the purposes of this subchapter.

(c) For the purposes of this subchapter, beneficial use of dredged material shall not be deemed practicable if the cost to the Land Office and qualified project partner for placement of the material dredged in constructing and maintaining navigation inlets and channels of the State exceeds the cost of obtaining similar material suitable for placement on eroding beaches or wetlands from another source, including transportation costs. In the case of placement for wetland restoration, the cost of soil preparation and treatment may also be considered.

(d) In determining the suitability and practicality of dredged material for beach placement the Land Office may refer to the guidance found in Chapter 9 of U.S. Army Corps of Engineers, Publication No. EM 1110-2-5026, "Engineering & Design, Beneficial Uses of Dredged Material," USACE, 30 June 1987 and U.S. Army Corps of Engineers, Publication No. EM 1110-2-1100, "Coastal Engineering Manual - Part V," Chapter 4, Beach Fill Design, USACE, 1 August 2008 [~~Design~~]. Copies of these publications can be obtained on request by mail sent to the General Land Office, Attn: Director, Planning, Permitting and Technical Services Division, Coastal Resources Program Area, [~~Coastal Stewardship Division,~~] P.O. Box 12873, Austin, TX 78711-2873 and [~~and/or~~] the U.S. Army Corps of Engineers web site located at http://140.194.76.129/publications/eng-manuals/ [~~http://www.usace.army.mil/inet/usace-docs/eng-manuals/cecw.htm~~]. Only beach-quality sand shall be considered for beach placement.

(e) In this section "beach-quality sand" means sediment material that:

(1) has effective grain size, mineralogy, and quality that approximates the existing beach material in the placement area;

(2) is low in fine grain, silty, or clayey sediments; and

(3) contains no hazardous substances listed in the Code of Federal Regulations, Title 40, Part 261, Subpart D - Lists of Hazardous Wastes, in concentrations which are harmful to human health or the environment as determined by applicable, relevant, and appropriate requirements established by the local, state, and federal governments.

(f) In determining the suitability and practicality of placement of dredged material for wetland restoration, the Land Office may refer to the guidance found in Chapter 5 of U.S. Army Corps of Engineers, Publication No. EM 1110-2-5026, "Engineering & Design, Beneficial Uses of Dredged Material," USACE, 30 June 1987. Copies of this publication can be obtained on request by mail sent to the General Land Office, Attn: Director, Planning, Permitting and Technical Services Division, Coastal Resources Program Area, [~~Coastal Stewardship Division,~~] P.O. Box 12873, Austin, TX 78711-2873 and/or the U.S. Army Corps of Engineers web site located at http://140.194.76.129/publications/eng-manuals [~~http://www.usace.army.mil/inet/usace-docs/eng-manuals~~].

(g) This section applies only to an erosion response project that receives funds from the coastal erosion response account after the effective date of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007047
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.15

The Texas Parks and Wildlife Department (TPWD) proposes an amendment to §53.15, concerning Miscellaneous Fisheries and Wildlife Licenses and Permits. The proposed amendment would locate all fees associated with the possession of plants in a single subsection and implement fees associated with the exotic microalgae permit created under new Chapter 70, concerning Plants, which is published elsewhere in this issue of the *Texas Register.*

The proposed amendment would preserve the existing $263 fee for an exotic species permit to possess and propagate water spinach, establish a fee of $263 for an exotic species permit to possess or import exotic aquatic vascular plants and macroalgae. The proposed amendment would also implement a fee of $500 for an application for or renewal of an exotic microalgae permit, an annual fee of $500 for an exotic microalgae permit, and a fee of $500 for each species of genetically modified microalgae that the applicant seeks to possess in any environment other than a closed facility.

The proposed fee for a permit regarding exotic vascular plants or macroalgae is unchanged from the current exotic species permit fee. The fee amounts for permit activities involving exotic microalgae are based in part on the historical cost to the department of processing permit applications and performing the facility inspections under the current exotic species permit rules. However, the department anticipates an increased staff commitment to microalgae permits, primarily in the form of a lengthier and more complicated vetting process, as well as the likelihood of frequent permit amendments as species are cycled through research and development assays. The propagation of microalgae, particularly genetically modified microalgae, is an emergent technology and there is much that is not known about these organisms and how they interact with the environment and native ecosystems. Therefore, additional staff commitments will be required to evaluate research data, monitor efforts, and for enforcement. The proposed $500 fee represents the agency's best estimate of what the fee needs to be in order to recoup the

agency's cost of administering the program. The fee of $500 per genetically modified microalgae is intended to offset the department's probable burden in studying the applicant's research data to determine that the particular microalgae does not pose environmental, economic, or health problems. The amount will be higher for persons who seek to possess genetically modified microalgae in an environment that is not a controlled facility. In such cases, the fee will be the $500 permit application fee and $500 per genetically modified microalgae that the applicant wishes to possess in an environment that is not a controlled facility.

Since exotic microalgae permits may extend for up to ten (10) years and the department will incur ongoing regulatory costs, as specified above, a $500 annual fee is also being proposed.

The department notes that if future empirical data indicates that the fee is too high, the department will recommend reducing it to an amount appropriate to recoup costs. As well, if future empirical data indicate that the fee is insufficient to recoup administrative and enforcement expenses, it is likely that the department would adjust the fee accordingly.

Gary Saul, Ph.D., Director of the department's Inland Fisheries Division, has determined that for each year of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rule, since the proposed fees are intended to recoup the cost to the department of administering and enforcing the rule.

Dr. Saul also has determined that for each year of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rule will be rules that establish fee amounts for permits administered by the department.

There will be economic costs for persons required to comply with the rule as proposed; namely, the fee for an exotic aquatic species permit for exotic vascular aquatic plants and macroalgae ($263), a new or renewed exotic microalgae permit ($500), and an additional fee for each genetically modified microalgae ($500/per genetically modified microalgae) that the applicant seeks to possess in an environment other than a controlled facility ($500).

The fee for an exotic species permit for exotic vascular aquatic plants and macroalgae is based on the historical cost to the department of processing permit applications and performing the required facility inspection under the current exotic species permit rules which regulate shrimp farms, the production of triploid grass carp, and the farming of water spinach.

The fee amounts for permit activities involving exotic microalgae are based in part on the historical cost to the department of processing permit applications and performing the facility inspections under the current exotic species permit rules. However, the department anticipates an increased staff commitment to microalgae permits, primarily in the form of a lengthier and more complicated vetting process, as well as the likelihood of frequent permit amendments as species are cycled through research and development assays. The propagation of microalgae, particularly genetically modified microalgae, is an emergent technology and there is much that is not known about these organisms and how they interact with the environment and native ecosystems. Therefore, additional staff commitments will be required to evaluate research data, monitor efforts, and for enforcement. The proposed $500 fee represents the agency's best estimate of what the fee needs to be in order to recoup the agency's cost of administering the program. The fee of $500 per genetically modified microalgae is intended to offset the department's probable burden in studying the applicant's research data to determine that the particular microalgae does not pose environmental, economic, or health problems. The amount will be higher for persons who seek to possess genetically modified microalgae in an environment that is not a controlled facility. In such cases, the fee will be the $500 permit application fee and $500 per genetically modified microalgae that the applicant wishes to possess in an environment that is not a controlled facility.

Since exotic microalgae permits may extend for up to ten (10) years and the department will incur ongoing regulatory costs, as specified above, a $500 annual fee is also being proposed.

The department notes that if future empirical data indicates that the fee is too high, the department will recommend reducing it to an amount appropriate to recoup costs. As well, if future empirical data indicate that the fee is insufficient to recoup administrative and enforcement expenses, it is likely that the department would adjust the fee accordingly.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic affect on small businesses and microbusinesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and microbusinesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement the result of which would be a directly imposed cost related to compliance, such as recordkeeping and/or reporting; required professional expertise (such as legal, accounting, or engineering); capital costs for any required equipment or modifications to existing processes and procedures; lost sales and profits; changes in market competition; extra tax costs; additional employment requirements; or required fees. Although the proposed amendment establishes the fee amounts for permits issued under proposed new Chapter 70, the implementation of the requirement for the fees is contained in the proposed new rules, which are published elsewhere in this issue of the *Texas Register.* The preambles for proposed new Chapter 70, Subchapters A and B each contain the required small and microbusiness impact statements; however, those statements are reproduced in this preamble as a convenience for the regulated community and other interested persons.

Exotic Aquatic Vascular Plants and Macroalgae

Businesses that would be required to comply with the provisions of the proposed rules are not currently required to provide information to the department regarding gross sales or number of employees. To attempt to determine the number of small and microbusinesses affected by the proposed rules, the department contacted persons and organizations known to be active in or knowledgeable about the exotic aquatic plant trade and developed a representative list of persons and businesses that could be affected.

The department then mailed a survey to the listing of persons and business that could be affected, requesting information regarding workforce numbers, gross annual receipts, and the species of exotic aquatic plants grown, bought, and/or sold. A

total of 166 surveys were mailed. In addition to information necessary to determine if the business is a small or microbusiness, the surveys asked respondents to list the name, and the quantity of exotic aquatic plants that are not on the proposed approved list that the business currently sells, purchases and/or grows, or plans to sell, purchase and/or grow, along with the estimated dollar value realized by the business's trade in the species.

The department received 29 survey responses, 27 of the businesses that responded were determined to qualify as small or microbusinesses. Of the 27 respondents determined to be small or microbusinesses, 13 indicated that they did not at present, and did not intend in the future, to grow, buy, or sell any exotic aquatic species that is not on the proposed approved list. Two respondents' submitted lists of species that consisted entirely of plants that are either native, naturalized, or on the approved list, which means the proposed new rules would not have an impact. The remaining 14 respondents indicated that they grow, buy, or sell, or intend to grow, buy, or sell, exotic aquatic plants for which a permit would be required under the proposed new rules, and identified those species and the current or expected sales volumes associated with each.

To obtain an exotic aquatic plant permit under the proposed rules, a person would be required to pay a fee of $263 and submit application materials describing the species, activities, and facilities to be covered by the permit and an emergency plan addressing the permittee's actions in the event of an emergency. The proposed rules also would impose labeling, packaging, transportation, and reporting and recordkeeping requirements.

The permit fee is a fixed cost to all permittees, and is the fee imposed under current rule for persons who possess or culture exotic species such as shrimp and water spinach. The department calculated the fee based on historical administrative and law enforcement costs, but the bulk of the fee is intended to recoup the expense to the department of conducting the facility inspection required by the proposed new rules.

The adverse economic impact to an applicant in compiling or developing the information required on the application for an exotic aquatic plant permit (a description of the species to be possessed, the activities to be engaged in, the facilities to be used, and an emergency plan addressing the permittee's actions in the event of an emergency) is estimated to be less than $100. The department believes that most if not all information required on an application will be information that the applicant has already developed as part of normal business practices and that the chief expense would be the collation of the material. With respect to the development of an emergency plan, the department believes that most if not all operations that will take place under an exotic aquatic species permit will be very similar in nature; therefore, the department will make available a model emergency plan and provide a list of components of an emergency plan, which should make it unnecessary for any affected party to engage outside expertise.

The adverse economic impact of the reporting and recordkeeping requirements of the proposed new rules cannot be exactly determined; however, the department believes that they should not exceed more than $100 per year. The primary expense is the required annual report that must account for the importation, possession, transport, sale, transfer, or other disposition of any exotic aquatic plant handled by the permittee during the reporting period. The department has determined that since under ordinary business practices this information already would have been collected, the expense to the permittee to collate the information and enter it on a department supplied form should not cost more than $100 per year.

The adverse economic impact to small and microbusinesses of complying with the labeling, packaging, and transportation requirements of the proposed new rules will vary. The proposed rules require exotic plants to be packaged and labeled when being transported and sets for specific packaging and labeling requirements. However, because of the variety of plants and their various uses (landscaping, food, cosmetics, etc.), as well as the transportation of exotic aquatic plants in various stages of processing, the proposed new rules also provide that the department may approve alternative packaging requirements. In practical terms, this means that the department will work with each permittee to devise a system of packaging that allows the department to effectively determine the identity and volume of exotic species being transported.

Shipments of exotic aquatic plants will be required to be labeled. As with the packaging requirements, the proposed new rules will allow alternative labeling requirements that will enable the department to impose effective labeling requirements while trying to minimize inconvenience to the regulated community. On this basis, the department estimates that the cost of complying with labeling and packaging requirements will be minimal and probably less than $200 per year.

If applicable, the proposed new rules would require a facility to be constructed in such a way as to prevent the discharge of exotic aquatic plants possessed under a permit. In those cases in which a facility is not an enclosed facility but is located within the 100-year flood plain, the proposed rules would require the construction of a dike or levee with a crest not less than one foot above the 100-year flood plain. These costs are dependent on the size and scope of regulated activities, and are associated with required professional expertise (construction/engineering); capital costs for modifications to existing processes and procedures; lost sales and profits; and changes in market competition.

The adverse economic impact to small and microbusinesses of the proposed new rules with respect to required professional expertise and capital costs for modifications of facilities are associated with meeting the requirements related to the prevention and control of overflow or flood events. The proposed new rules would require an applicant to provide sufficient information for the department to determine the effectiveness of a facility with respect to preventing the discharge of exotic aquatic plants into the environment. Most if not all facilities that the department is aware of are enclosed facilities (i.e., indoor facilities such as greenhouses). However, if an applicant's facility is an open facility and is deemed insufficient for preventing or controlling discharges of exotic aquatic plants, it is possible that the applicant would be faced with expenses related to construction in order to comply with the requirements of the proposed new subchapter. The department notes that if a facility is capable of discharging water or wastewater into water in the state, it must comply with the regulations of the Texas Commission on Environmental Quality (TCEQ), which in most cases will mean that the facility would have to meet TCEQ requirements, regardless of the requirements the proposed new rules anyway. However, it is possible that in some cases drainage systems or other infrastructure may need to be installed or improved in order for a facility to be permitted. The department estimates this cost at $2,500 per facility or less. This estimate was derived by using department construction information related to fish hatchery construction, specifically, trenching and burying of culverts, which is

the typical method for draining or diverting water. The department notes that because such facilities have not been regulated by the department to the extent provided in this proposed rulemaking, and may vary significantly in size, dimension, elevation, and other considerations, there may be instances in which costs for drainage installation or improvement could exceed $2,500. It should also be noted that many, if not all of these facilities would be required to address discharge pursuant to statutes and regulations administered by the TCEQ. As a result, in those instances, such costs are not necessarily required solely because of the proposed regulations.

Additionally, another requirement of the proposed new rules would stipulate that all unenclosed facilities located within the 100-year floodplain be surrounded by a dyke or levee with a crest not less than one foot above the 100-year flood plain level. The department estimates that the cost of compliance with this provision is approximately $45 per linear foot. This estimate was derived by using department data for the construction of earthen retention structures at department fish hatcheries, which serve a similar purpose. The estimate assumes an embankment 16 feet wide at the top, and 50 feet wide at the base, and 9 feet high, which the department believes is far more than would be required for compliance with the proposed new rules anywhere in the state. The estimate was calculated based on the volume of material that would have to be excavated, hauled, filled and, compacted, and assumes that suitable soils are available on-site. If material has to be excavated elsewhere and hauled to the site, the cost will be higher; however, that cost will vary based on the availability and location of suitable material.

The proposed new rules will in some cases result in adverse economic impacts to small and microbusinesses as a result of lost sales and profits, but are not expected to alter market competition. The average per-business value of exotic aquatic plants affected by the proposed new rules, as reported by respondents to the department's survey, was $21,147.86. Out of the 14 businesses reporting, three reported sales of affected plants of between $90,000 and $40,000 per year (primarily consisting of one species, *Colocasia esculenta,* a species of *Colocasia,* often referred to as "elephant ear"); six reported sales of affected plants of between $30,000 and $9,000 per year; and the remaining five businesses reported sales of affected species under $1,500 per year. If the affected small and microbusinesses cease possessing, buying, and selling the species for which a permit is required, the department estimates that the adverse economic impact in loss of sales to small and microbusinesses would be between $90,000 and $100, depending on the volume of trade in affected plant species. This impact also assumes that sales of approved plants would not be substituted for the plants that could no longer be sold. The department also notes that the proposed rules do not prohibit the sale of regulated exotic aquatic plants to buyers outside of the state, so it is possible that there will be no loss of sales or a reduced loss of sales for small and microbusinesses who sell all or part of their inventory to out-of-state buyers.

With respect to alteration of market competition, the proposed new rules apply a uniform standard to all businesses, including small and microbusinesses, in the state that engage in the possession, purchase, and sale of exotic aquatic plants and neither confer advantages to nor deprive advantages from one type of business versus another.

The department has determined that rules as proposed will not result in a need for small and microbusinesses to hire additional employees. The reporting and recordkeeping requirements rely on data that is ordinarily collected as part of normal business practices. The packaging and labeling costs can to some extent be minimized by tailoring permit provisions. Any other requirements, such as additional professional expertise, are not ongoing expenses that would entail hiring additional permanent employees.

The department considered several alternatives to the rules as proposed. One alternative considered was to allow all exotic aquatic plants currently in trade to remain in trade without permit requirements. This alternative was rejected because the department's risk-assessment model indicated that there are exotic aquatic plants currently in trade, such as *Colocasia esculenta,* that have the potential to cause or have caused environmental, economic, or health problems and therefore must be regulated. To allow those species to be possessed without a permit would defeat the purpose of the rules. Another alternative considered was to create separate facility requirements. This alternative was rejected because the risk of environmental, economic, and health problems associated with plants identified by the risk analysis as being problematic would be increased to an unacceptable level, which defeats the purpose of the proposed new rules.

Exotic Microalgae

To the department's knowledge, no entity affected by the proposed amendment is a small or microbusiness. The department is aware of a number of entities that have or are intending to become involved in the propagation of exotic microalgae for biofuel or other products. However, those entities are either larger than a small business or microbusiness or were not formed to the purpose of making a profit. Therefore, the department does not believe that an economic impact statement or regulatory flexibility analysis is required for the proposed new rules. However, in the event a small or microbusiness is impacted by the rule, the costs of compliance would be as stated in this preamble for persons required to comply with the rules as proposed. The department considered several alternatives to the rules as proposed. One alternative considered was to not regulate the possession of exotic microalgae. This alternative was rejected because exotic microalgae has the potential to cause or have caused environmental, economic, or health problems. To allow those species to be possessed without a permit would defeat the purpose of the rules and Parks and Wildlife Code, §66.007. Another alternative considered was to create separate facility requirements. This alternative was rejected because the risk of environmental, economic, and health problems associated with exotic microalgae would be increased to an unacceptable level, which defeats the purpose of the proposed new rules.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Texas Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Texas Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposal may be submitted to Ken Kurzawski, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4591; email: ken.kurzawski@tpwd.state.tx.us.

The amendment is proposed under Texas Parks and Wildlife Code, §11.027(b), which authorizes the commission to establish and provide for the collection of a fee to cover costs associated with the review of an application for a permit required by the Texas Parks and Wildlife Code.

The amendment affects Texas Parks and Wildlife Code, Chapters 12 and 66.

§53.15. Miscellaneous Fisheries and Wildlife Licenses and Permits.

(a) Trap, transport and transplant permit application fees:

(1) nonrefundable application processing fee--$750 per release site; and

(2) nonrefundable application processing fee for amendment to existing permit--$30. If the amendment includes additional release sites, the fee prescribed by paragraph (1) of this subsection shall be imposed for each additional release site.

(b) Game bird and animal breeding licenses:

(1) game animal breeder's--$79;

(2) class 1 commercial game bird breeder's--$189; and

(3) class 2 commercial game bird breeder's--$27.

(c) Commercial nongame permits:

(1) resident nongame permit--$19;

(2) nonresident nongame permit--$63;

(3) resident nongame dealer permit--$63;

(4) nonresident nongame dealer permit--$252;

(5) nongame species sales permit--$210; and

(6) nongame species sales permit renewal--$210.

(d) Zoological collection permit application--$158.[;]

(e) Scientific research permit application--$53.[;]

(f) Educational display permit application--$53.[;]

(g) Exotic Species (fish and[,] shellfish [~~and aquatic plants~~]):

(1) exotic species permit fee for new, renewed or amended application requiring facility inspection--$263;

(2) exotic species permit fee for renewed or amended application not requiring facility inspection--$27;

(3) exotic species permit fee for renewal application received more than one year after renewal date--$263;[.]

(4) triploid grass carp permit application fee--$16, plus $2 per triploid grass carp requested;

(5) exotic species interstate transport permit application fee--individual--$27; and

(6) exotic species interstate transport permit application fee--annual--$105.

(h) Exotic Species (aquatic plants):

(1) Water Spinach. Exotic species permit fee for new, renewed or amended application for water spinach--$263.

(2) Vascular. Exotic species permit fee for new, renewed or amended application for possession of a vascular plant or macroalgae, other than water spinach--$263.

(3) Microalgae. Exotic species permit fee for possession of exotic microalgae:

(A) initial fee for new or renewed permit--$500;

(B) annual fee--$500; and

(C) fee per genetically modified microalgae that the applicant seeks to possess in an environment other than a controlled facility--$500.

(i) [~~(h)~~] Miscellaneous fees:

(1) commercial plant permit--$50;

(2) aerial management permit--$210;

(3) broodfish permit application--$25;

(4) permit to introduce fish, shellfish, or aquatic plants--no fee;

(5) offshore aquaculture permit or renewal--$1,575;

(6) oyster lease application--$200;

(7) oyster lease rental--$6 per acre of location per year;

(8) oyster lease renewal/transfer/sale--$200; and

(9) double-crested cormorant control permit--$13.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007040
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 389-4775

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CHAPTER 70. PLANTS
SUBCHAPTER A. EXOTIC AQUATIC VASCULAR PLANTS AND MACROALGAE

31 TAC §§70.1 - 70.19

The Texas Parks and Wildlife Department (the department) proposes new §§70.1 - 70.19, concerning Exotic Aquatic Vascular Plants and Macroalgae. The proposed new rules would constitute a new subchapter (Subchapter A) within a new chapter (Chapter 70) devoted specifically to regulations governing plants. Although this rulemaking proposes new rules governing exotic aquatic vascular plants and macroalgae, all department regulations governing plants eventually will be relocated to new Chapter 70.

Background

As part of the review of the department pursuant to Texas Government Code, Chapter 325 (the Texas Sunset Act), the Texas Sunset Advisory Commission issued a report that recommended, among other things, that the department be required "to create a list of aquatic plants that may be imported and possessed within Texas without a permit." See, Sunset Advisory Commission Final Report, Texas Parks and Wildlife Department, July 2009, p. 5. In 2009, the 81st Texas Legislature enacted House Bill 3391 (HB 3391), often referred to as the department's

sunset bill which amended Texas Parks and Wildlife Code, §66.007 to require the department to adopt by rule a list of exotic aquatic plants "that are approved for importation into or possession in this state without a permit" issued by the department. Texas Parks and Wildlife Code §66.007(b)(2). This legislation required that the department "strive to ensure that the rules are as permissive as possible without allowing the importation or possession of plants that pose environmental, economic, or health problems." Texas Parks and Wildlife Code §66.007(b). This statute goes on to state that a "person may not import into or possess in this state an exotic aquatic plant unless: (1) the plant is on the approved list; or (2) the person has an exotic species permit issued by the department." Texas Parks and Wildlife Code §66.007(m). The approved list is required to include "an exotic aquatic plant that "(1) is widespread in this state; and, (2) is not, as determined by the department, a cause of environmental, economic, or health problems." Texas Parks and Wildlife Code §66.007(o). The department is also required to develop a process to evaluate the potential harm that may be caused by the importation or possession of an exotic aquatic plant and to develop a process for adding exotic aquatic plants to the list of plants approved for import or possession. Texas Parks and Wildlife Code §66.007(n) and (p).

Exotic aquatic plant species are an increasing problem in Texas. Aquatic plants that are not native to Texas may compete with native plants and damage habitat for fish and other aquatic species. Because introduced species often lack natural enemies in their new environment, they can multiply and spread at an alarming rate, interfering with boat traffic, affecting water quality, and out-competing native plants. Some exotic aquatic plants grow, reproduce, and spread with great speed and vigor, readily establishing over large areas, and are often resistant to eradication and/or removal efforts. As exotic aquatic species spread and dominate ecosystems, they decrease biodiversity by destroying habitat that native plants and animals depend upon for survival. In addition to negatively impacting ecosystems, exotic aquatic species also cause economic damage. It is very expensive to prevent, monitor and control the spread of exotic aquatic plants, not to mention the damage to fisheries, forests, and other resources, such as recreational environments.

Not every exotic plant is invasive. Some exotic plants can be grown as crops or ornamentals without causing environmental, economic, or health problems. Some exotic aquatic species cannot survive on their own in Texas. However, others are so dangerous that significant restrictions are necessary to prevent their spread.

Current department rules in Chapter 57, Subchapter A, regulate harmful or potentially harmful fish, shellfish, and aquatic plants. Section 57.119 of those rules contains a list of exotic aquatic plant species that may not be possessed in Texas. Under the current regulatory approach, an exotic aquatic plant may be possessed in Texas, unless it is on the list of prohibited plants (the prohibited list), although some plants on the prohibited list may be possessed with a department-issued exotic species permit.

The new regulatory approach, as contained in the proposed rules, prohibits possession of an exotic aquatic plan in Texas unless the plant is on the list of plants approved for possession in Texas (the approved list), although the proposed regulations would allow possession of some exotic aquatic plants that are not the approved list with an exotic species permit.

The proposed regulations implementing the HB 3391 are divided into two subchapters. Proposed Subchapter B of Chapter 70, published elsewhere in this issue of the *Texas Register,* contains regulations regarding exotic microalgae. Subchapter A of Chapter 70, proposed in this rulemaking, concerns vascular plants and macroalgae. Although microalgae, macroalgae, and vascular plants are all considered plants pursuant to the Integrated Taxonomic Information System (ITIS; See, http://www.itis.gov/.), there are sufficient differences between the cultivation and uses of microalgae and the cultivation and uses of vascular plants and macroalgae, that separate subchapters are warranted for purposes of regulatory clarity.

Applicability

Proposed new §70.1, concerning Applicability, would provide for the primacy of new Chapter 70, Subchapter A, in any conflict with the provisions of Chapter 57, Subchapter A, and create an exception for the provisions of §57.136, a rule in Chapter 57, Subchapter A, that governs the possession of water spinach. The provisions are necessary to prevent confusion by clearly establishing that Chapter 57, Subchapter A, will no longer govern the regulation of plants, with the exception of water spinach, and would make it clear that nothing in the rules absolves any person of the obligation to comply with other applicable law.

In addition, proposed new §70.1 provides that the provisions of Chapter 70, Subchapter A do not apply to the possession of exotic microalgae. Although considered an exotic aquatic plant, exotic microalgae is addressed in a proposed new Chapter 70, Subchapter B, published elsewhere in this issue of the *Texas Register.* Issues regarding microalgae are sufficiently different from issues regarding vascular plants and microalgae, that for purposes of clarity, microalgae regulations are contained in a separate subchapter.

Proposed new §70.1(e) would provide that the proposed new rules do not relieve any person from compliance with any applicable federal, state, or local law. The proposed new provision is necessary to ensure that the regulated community is not misled into thinking that compliance with federal, state, or local laws is not necessary.

Definitions

Proposed new §70.2, concerning Definitions, would establish meanings for specific words and terms used in the proposed new rules, which is generally necessary to provide unambiguous terminology for purposes of promoting compliance and enhancing enforcement by reducing or eliminating the potential for confusion.

Proposed new §70.2(1) would establish a meaning for the term "approved list." Under the terms of HB 3391, the department is required to develop a list of exotic aquatic plants that may be imported or possessed without a permit. This term is intended to provide a shorthand method of referencing that list.

Proposed new §70.2(2) would establish a meaning for "aquatic plant." The definition would designate as an aquatic plant any member of the Kingdom Plantae, as documented by the Integrated Taxonomic Information System, that is normally found in riparian or aquatic habitats. Under Texas Parks and Wildlife Code, §66.007(e), as amended by HB 3391, the term "exotic aquatic plant" is defined as "a nonindigenous aquatic plant that is not normally found in aquatic or riparian areas of this state." However, the term "plant" was not defined by §66.007. Therefore, in developing the definition of "aquatic plant" the department looked to the definition of "plant" from the Integrated Taxonomic Information System which was developed by a

partnership of federal agencies, including National Oceanic and Atmospheric Administration, U.S. Geological Survey, Environmental Protection Agency, U.S. Department of Agriculture, Agriculture Research Service, Natural Resources Conservation Service, and the Smithsonian Institution National Museum of Natural History. This partnership was formed to satisfy these agencies' mutual needs for a uniform taxonomic reference system.

Proposed new §70.2(3) would establish the word "commission" as shorthand for the Texas Parks and Wildlife Commission.

Proposed new §70.2(4) would establish a meaning for the term "controlled facility." The term would be defined as "a facility in which exotic aquatic plants at all times under normal conditions are protected, at a minimum, by a building or vessel that effectively surrounds and encloses the exotic aquatic plant and includes features designed to restrict the plant from leaving." The proposed definition is necessary because the term is used in defining permit requirements in §70.12. By defining what constitutes a controlled facility, the department is able to tailor permit and regulatory provisions based on threat level.

Proposed new §70.2(5) would establish the word "department" as shorthand for the Texas Parks and Wildlife Department.

Proposed new §70.2(6) would establish the word "director" as shorthand for the Executive Director of the Texas Parks and Wildlife Department.

Proposed new §70.2(7) would establish a meaning for the word "discharge," which would be defined as "to deposit, conduct, drain, emit, throw, or run; allow to seep, escape, or spread; or otherwise release or dispose of, or to allow, permit, or suffer any of these acts or omissions by any means, including, but not limited to discharge as a result of flooding or overflow." This definition is based, in part, on Texas Water Code, §26.001(20), and is necessary to provide a convenient, abbreviated reference for what otherwise is a voluminous suite of actions and states with respect to exotic aquatic plants.

Proposed new §70.2(8) would establish a meaning for the term "exotic aquatic plant" by reproducing the statutory definition contained at Texas Parks and Wildlife Code, §66.007(e)(2) and clarifying that genetically modified aquatic plants and certain hybridized aquatic plants would be regarded as exotic aquatic plants for purposes of the subchapter.

Proposed new §70.2(9) would establish a meaning for the term "facility infrastructure." The proposed definition would identify the types of physical equipment and structures that would be affected or regulated by the proposed new rules, which is necessary to ensure that permittees understand how to comply with the rules and the provisions of a permit.

Proposed new §70.2(10) would establish a meaning for the term "ineligible species list." The proposed new rules would create an "approved list" of exotic aquatic plants that may be possessed without a permit, and would create a mechanism for the evaluation of exotic aquatic plants for possible inclusion on the approved list. However, once a species has been considered by the department and rejected for inclusion on the approved list, the proposed rules provide that the department does not intend to reassess that particular plant again, except in cases where there is new information about a plant. The "ineligible species list is defined as a "list of species maintained by the department of exotic aquatic plants that are not eligible for inclusion on the approved list." The definition goes on to provide that the ineligible species list includes "species known to be toxic" as well as species known to cause or to potentially cause "environmental, economic, or health problems."

Proposed new §70.2(11) would define the term "macroalgae" as "macroscopic, non-vascular aquatic plants." The definition is necessary because the proposed new rules contained in proposed new Subchapter A would regulate only those species of photosynthetic algae visible without magnification. The definition is a generally accepted scientific standard.

Proposed new §70.2(12) would define the term "microalgae" as "microscopic photosynthetic aquatic plants." The definition is necessary because the proposed new rules would regulate only those species of photosynthetic algae that are not visible without magnification. Exotic microalgae are addressed in proposed new Chapter 70, Subchapter B, published elsewhere in this issue of the *Texas Register.* The definition is a generally accepted scientific standard.

Proposed new §70.2(13) would define the term "native" as " a species of which the first documented occurrence in water in the state of Texas or the western Gulf of Mexico was not the result of known intentional or unintentional introduction by man." The definition is necessary because Texas Parks and Wildlife Code, §66.007 specifically addresses exotic aquatic plants. Therefore, the rules should provide clear guidance as to how an exotic aquatic plant can be differentiated from aquatic plants that are native.

Proposed new §70.2(14) would define the term "naturalized" as "a non-native species that does not require human assistance to reproduce and maintain itself over time in an area where it is not native. The definition also provides that the term is limited to species that have become integrated into a stable and diverse environmental community, and does not include plants that invade, dominate, or cause a substantial reduction in native species or facilitate the eradication of native species." The definition is necessary for establishing a distinction between aquatic plants that are exotic and all other aquatic plants.

Proposed new §70.2(15) would define the term "nonindigenous" as "not native or naturalized to water in the state of the western Gulf of Mexico." The definition is necessary for establishing a distinction between exotic aquatic plants and other aquatic plants.

Proposed new §70.2(16) would define the term "nonviable" as "permanently incapable of spreading, propagation, or being propagated." Proposed new §70.3(b) allows the possession of nonviable plants without a permit; therefore, it is necessary to define "nonviable."

Proposed new §70.2(17) would establish a meaning for the word "permit." The definition would clarify that the term "permit," as used in the proposed new rules, applies only to those permits issued under the authority Chapter 70, Subchapter A. The proposed definition is necessary to eliminate confusion with respect to other permits issued by the department.

Proposed new §70.2(18) would establish a meaning for the term "permittee." The definition is necessary to prevent confusion as to whom the provisions of the proposed new rules governing the privileges and restrictions of exotic aquatic plant permits would apply.

Proposed new §70.2(19) would establish a meaning for the term "possess." For the sake of a convenient, abbreviated reference for what otherwise is a voluminous suite of actions and states with respect to exotic aquatic plants, the department would de-

fine "possess" as "a status of care, custody, or control that includes but is not limited to acquiring, holding, displaying, propagating, selling, offering for sale, purchasing, transporting, importing, exporting, or placing into water in the state" so as to be able to use a single term throughout the rules.

Proposed new §70.2(20) would define the term "propagate" as "to multiply by sexual or asexual reproduction, including by natural or human causation," which is necessary to clearly identify an activity/process addressed elsewhere in the proposed rules. The definition is generally accepted within scientific communities.

Proposed new §70.2(21) would define the word "propagule." The word "propagule" has a specific scientific meaning, which is "any biological structure capable of propagating a plant."

Proposed new §70.2(22) would define the word "toxic" as "containing or producing poisonous material at a level or concentration capable of causing death or bodily injury to humans or causing death or debilitation to animals or plants." The proposed new rules contain provisions regarding exotic aquatic plants with toxic qualities; thus, it is necessary to create a clear understanding of what is meant by the word "toxic" in order to facilitate compliance and enforcement.

Proposed new §70.2(23) defines the term "water in the state." The proposed new rules contain provisions governing the discharge into "water in the state." Therefore, the proposed definition merely refers to the statutory definition in Texas Water Code, §26.001(5). Referencing the Texas Water Code is intended to avoid differential standards and confusing conflicts between regulatory definitions.

Proposed new §70.2(24) defines the term "western Gulf of Mexico." The proposed definitions of "native" and "nonindigenous" include the phrase "western Gulf of Mexico" as a geographical delimiter for determining whether a given aquatic plant is classified as an exotic for the purposes of the proposed new rules. The proposed definition would establish a distinct geographical area to which the term applies.

General Provisions

Proposed new §70.3, concerning General Provisions, would establish provisions of general applicability.

Proposed new §70.3(a) would specify the circumstances under which an exotic aquatic plant permit is required. Under the provisions of Texas Parks and Wildlife Code, §66.007(m), no person may import into or possess in this state an exotic aquatic plant unless the plant is on the approved list or the person has an exotic aquatic plant permit issued by the department. Proposed new §70.3(b) would set forth by rule the circumstances under which an exotic aquatic plant permit is not required. Proposed new §70.3(b)(1) would clearly state that no permit is required to possess an exotic aquatic plant that is on the approved list. Proposed new §70.3(b)(2) - (5) would stipulate that no permit is required to possess or import hybrid species if all parental species are native or naturalized, native or naturalized species, an exotic aquatic species contained in the ballast water or attached to a ship in the Gulf of Mexico, or an exotic aquatic plant that is nonviable.

Proposed new §70.3(c) would establish the department's policy with regard to taxonomic identification of organisms for purposes of determining whether the proposed new rules apply to any given organism. Proposed new §70.3(c)(1) would provide that reclassification of a species, a change in nomenclature, or the use of synonyms for a particular plant or group of plants would not in and of itself change the regulatory status of a plant. This paragraph is necessary to make clear that a name change does not affect the status of an organism with respect to the applicability of the proposed new rules. Proposed new subsection §70.3(c)(2) provides that the department will not consider classifications higher than the species level when evaluating plants for the approved list of exotic aquatic plants. The department has determined that classifications above the species level are too broad to allow effective regulation of specific exotic aquatic plants since a single genus can contain numerous species with different characteristics. Proposed new §70.3(c)(3) would require an applicant to identify each exotic aquatic plant that the applicant seeks to possess under a permit at a level no higher that the taxonomic rank of species on the hierarchy of biological classification.

Proposed new §70.3(d) would require a permittee to submit samples of exotic aquatic plants for identification and analysis at the request of the department. The proposed new paragraph is necessary to ensure that exotic aquatic plants in the possession of permittees are in fact the exotic plants the permittee is authorized to possess.

Proposed new §70.3(e) would require the department to maintain a list of ineligible species. Such a list will ensure that the regulated community is kept aware of those species that the department has evaluated and found to be a risk for causing environmental, economic, or health problems.

Types of Exotic Aquatic Plant Permits

Proposed new §70.4, concerning Types of Exotic Aquatic Plant Permits, would delineate the specific purposes for which the department will consider issuance of exotic aquatic plant permits under the new subchapter.

Proposed new §70.4(a)(1) would authorize the issuance of an exotic aquatic plant permit for scientific research. Under Texas Parks and Wildlife Code, §66.007(r), the department may issue an exotic aquatic plant permit for a plant that is part of a bona fide scientific research program approved by the department.

Proposed new §70.4(a)(2) would authorize the issuance of an exotic aquatic plant permit for industrial/commercial production. Under Texas Parks and Wildlife Code, §66.007(r), the department may issue an exotic aquatic plant permit for an appropriate use that will not result in potential environmental, economic, or health problems. To that end, the department will consider the issuance of permits for industrial/commercial production, provided the department is satisfied that the prospective activities will not result in potential environmental, economic, or health problems.

Proposed new §70.4(a)(3) would authorize the issuance of an exotic aquatic plant permit for management and control. The department acknowledges the usefulness of exotic aquatic plants in applications related to the management of invasive species, and will consider the issuance of permits for management and control, provided the department is satisfied that the prospective activities will not result in potential environmental, economic, or health problems.

Proposed new §70.4(a)(4) would authorize the issuance of an exotic aquatic plant permit for wastewater treatment. The use of aquatic plants for filtering and treating wastewater is well established as an ecologically beneficial practice. The department will consider the issuance of permits for wastewater treatment, provided the department is satisfied that the prospective activi-

ties will not result in potential environmental, economic, or health problems.

Proposed new §70.4(a)(5) would authorize the issuance of an exotic aquatic plant permit for educational or botanical purposes. A permit for educational or botanical purposes would authorize possession of an exotic aquatic plant for activities intended to encourage management and conservation of plants and other natural resources.

Proposed new §70.4(b) would stipulate that the department will not issue a permit authorizing the sale of an exotic aquatic species that is not on the approved list, except for sale to a source outside the state of Texas or to another person authorized by a permit issued under the subchapter to possess the exotic aquatic plant species.

Permit Application

Proposed new §70.5, concerning Permit Application, would set forth the specific requirements that prospective permittees would be required to meet in order to apply for issuance of an exotic aquatic plant permit under the proposed new subchapter. As noted above, under the proposed new regulatory structure, exotic aquatic plants that have been evaluated and determined to be a low risk for environmental, health or economic problems have been placed on the approved list. Species on the approved list may be possessed without a permit. Other exotic aquatic plants may be possessed only pursuant to permit issued by the department. Therefore, exotic aquatic plant species for which a permit is required are, by definition, species that pose a higher risk of environmental, health or economic problems. As a result, the proposed permitting process is designed to reduce the risks associated with possession of exotic aquatic plants that pose a higher risk of environmental, economic or health problems.

Proposed new §70.5(a) and (b) would require an applicant to submit a complete application on a form supplied or approved by the department. An administratively complete application would require a complete list of the species the applicant seeks to possess, the native range and distribution of each of those species, a description of all activities the applicant seeks to conduct, a description of where and how species will be contained and of control measure in place to prevent discharge of the species, the required fee, and additional information reasonably requested by the department. The department will not issue a permit unless and until all information required by the rules and all additional information the department has determined is necessary has been furnished.

Proposed new §70.5(c) would set forth the application requirements for persons seeking a permit that would authorize propagation of exotic aquatic plant species, in addition to the requirements of proposed new subsections (a) and (b). New §70.5(c)(1) would require a person seeking a permit authorizing the propagation of exotic aquatic plants to furnish information regarding compliance with the rules of the Texas Commission on Environmental Quality (TCEQ) regarding wastewater discharge or documentation demonstrating that any facility is designed such that discharge of waste in the water of the state will not or is unlikely to occur.

Proposed new §70.5(c)(2) would require an applicant to furnish the name, physical address, and telephone number of the owner of the property or properties where prospective activities will take place, which is necessary for effective regulation.

Proposed new §70.5(c)(3) would require an applicant to furnish an emergency plan describing the course of action in the event of an unauthorized discharge of waste into the water in the state occurs. Given the potential for environmental, economic, or health impacts in the event that exotic aquatic plants are released from a facility, an emergency plan offers both the permittee and any involved regulatory entities a course of action to be immediately put into effect in the event of an unauthorized discharge, which increases the probability that damages can be prevented or minimized.

Proposed new §70.5(c)(4) would require an applicant to demonstrate compliance with the provisions of proposed new §70.12, concerning Facility Requirements. The applicant would be required to furnish a schematic of the facility indicating the location and functional identification of all infrastructure, all structures that drain the facility, all points at which effluent of any kind is or may be discharged from the facility, all structures or equipment designed or intended to prevent escapement of exotic aquatic plants or their propagules, and sufficient information to allow the department to determine the effectiveness of facility systems at preventing discharge of exotic aquatic plants, including a description of the materials to be used and a description of how the system is to be deployed. In general, the department must evaluate a prospective facility's design and system parameters in order to determine that the facility is capable of operating in a manner that can reasonably be expected to prevent the release or escapement of exotic aquatic plants to the environment. To this end, it is necessary to obtain sufficient information concerning the structures and equipment that the applicant intends to install or operate.

Permit Issuance, Renewal, or Amendment

Proposed new §70.6, concerning Permit Issuance, Renewal, or Amendment, would set forth the standards the department will follow regarding the issuance, renewal, or amendment of permits issued under the proposed new subchapter.

Proposed new §70.6(a) would require permits to be issued to named individuals, but allow entities such as corporations, governmental subdivisions or agencies, trusts, partnerships, and associations to be named as co-permittees, and would stipulate that all persons and entities named on a permit be responsible for compliance with the provisions of a permit and the proposed new subchapter.

Proposed new §70.6(b) would prescribe the conditions under which the department would consider issuing or renewing a permit under the proposed new subchapter. To be considered for permit issuance or renewal, an applicant would be required to have met all of the application requirements in the subchapter and be in compliance with all provisions of the subchapter and any previous permit provisions (if the permittee is seeking renewal).

Proposed new §70.6(c) would provide that the department will issue or deny an exotic aquatic plant permit or renewal within 90 calendar days of receiving an administratively completed permit application and that if the department is unable to issue or deny issuance of an exotic aquatic plant permit or renewal within the 90-day period provided in this subsection, the department may extend the period for issuing or denying an exotic aquatic plant permit or renewal by an additional 30 calendar days by informing the applicant in writing of the reason for the delay.

Proposed new §70.6(d) would provide that if the department does not act to issue or deny a permit renewal or amendment

within the time periods specified in subsection (c), the permit renewal or amendment would be considered renewed or amended.

Proposed new §70.6(e) would provide that prior to permit issuance or renewal, the department may perform a facility inspection to determine whether the facility is in compliance with the proposed new subchapter. The proposed new provision is necessary to provide verification of the existence of all infrastructure and processes in compliance with the proposed new subchapter.

Proposed new §70.6(f) would set forth the conditions for provisional approval of a facility. The department is conscious that prospective permittees might be hesitant to invest capital in facilities before knowing that the department will issue a permit. Therefore, the proposed new subsection would allow the provisional approval of a facility, provided the applicant has met all requirements for permit application and issuance and has demonstrated to the department's satisfaction that facility will meet all applicable facility requirements set forth in the rules.

Proposed new §70.6(g) would provide that the department may deny a permit for an applicant to whom a letter of provisional approval has been issued if the applicant fails to construct the facility within two years of receiving a letter of provisional approval, the facility as built is significantly different from the planned facility, or the information provided in the permit application materially changes after the issuance of the provisional approval letter.

Proposed new §70.6(h) would require a permittee to submit an application for a permit amendment prior to making any material changes in the conditions, facilities or activities addressed in the permit and would prohibit a permittee from implementing any such material changes until a permit amendment has been authorized by the department. The application for a permit amendment would be required to include, at a minimum, an accurate narrative description of all planned material changes in the conditions, facilities or activities addressed in the permit and the documents required to be submitted for the initial permit, modified to clearly reflect any material changes in the conditions, facilities or activities to be changed under the permit amendment.

Permit Privileges, Restrictions, and Term

Proposed new §70.7, concerning Permit Privileges, Restrictions, and Term, would provide that a permit issued under the proposed new subchapter authorizes specific activities involving specific exotic aquatic species at specific times and places as set forth in the permit provisions, and prescribes a one-year period of validity for a permit, and would stipulate that permits are not transferable. The provisions of an exotic aquatic plant permit are intended to constitute a complete and total statement of the species that a permittee is allowed to possess and the activities in which a permittee is authorized to engage.

Denial of Issuance or Renewal

Proposed new §70.8, concerning Denial of Issuance or Renewal, would address the conditions under which the department may refuse or withhold issuance or renewal of an exotic aquatic plant permit. Although most of these conditions are generally understood, they are set out to ensure clarity.

Proposed new §70.8(a)(1) provides that the department may refuse permit issuance or renewal to an applicant who has not met the requirements for a permit under the proposed new subchapter or other law.

Proposed new §70.8(a)(2) provides that the department may refuse permit issuance or renewal when there is insufficient information to determine whether the species the applicant seeks to posses will cause environmental, economic, or health problems. It is prudent to refuse to issue a permit to an applicant who seeks to possess an exotic aquatic plant whose biological properties and potential impacts are not known.

Proposed new §70.8(a)(3) provides that the department may refuse permit issuance or renewal to a person who has not abided by the conditions of a previous permit.

Proposed new §70.8(a)(4) provides that the department may refuse permit issuance or renewal to a person who is delinquent in paying a debt to the department.

Proposed new §70.8(a)(5) provides that the department may refuse permit issuance or renewal to a person who is ineligible to hold a permit due to child-support enforcement actions. Under the provisions of Texas Family Code, Chapter 232, the Attorney General is authorized to prevent the issuance of permits to any person who is delinquent in the discharge of court-ordered child-support obligations.

Proposed new §70.8(a)(6) provides that the department may refuse permit issuance or renewal to a person who has made false statements or material misrepresentations on an application for a permit.

Proposed new §70.8(a)(7) and (8) provide that the department may refuse permit issuance or renewal to a person who refuses to provide information requested by the department, including information regarding the applicant's criminal history. The provisions of proposed new §70.6, concerning Permit Issuance, Renewal, or Amendment, require an applicant to furnish any additional information the department considers necessary to evaluate the application.

Proposed new §70.8(a)(9) provides that the department may refuse permit issuance or renewal to a person who has been convicted, pleaded nolo contendere, received deferred adjudication or pretrial diversion or a civil penalty, if applicable, for a violation of the proposed new chapter; Chapter 57, Subchapter A or C; a violation of Texas Parks and Wildlife Code that is a Class A or B misdemeanor, or a felony; or the federal Lacey Act. The purpose of the proposed new provisions is to protect native ecosystems by providing that the department may deny permit issuance or renewal to persons who have been proven to exhibit disregard for major statutes and regulations governing the conservation of fish and wildlife, especially the possession of aquatic species, from obtaining permits.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law enacted in 1900 that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported or sold in violation of state law. Lacey Act prosecutions are normally conducted by the U.S. Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is predicated on a violation of state law, the federal government need only prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction.

The denial of issuance or renewal of an exotic aquatic plant permit under proposed §70.8 would not be automatic, but be within the discretion of the department. Factors that may be considered by the department in determining whether to issue or renew a permit under §70.8 would include, but not be limited to, the seriousness of the offense, the number of offenses, the ex-

istence or absences of a pattern of offenses, the length of time between the offense and the permit application, the applicant's efforts towards rehabilitation, and the accuracy of the information provided by the applicant regarding the applicant's prior permit history.

Proposed new §70.8(b) provides that the department may withhold the processing of a permit or renewal application if the applicant is a defendant in a criminal prosecution or proceeding to assess a civil penalty, if applicable, for any of the violations listed in proposed new §70.8(a)(9). The proposed new subsection is necessary for the same reasons articulated in the discussion of proposed new §70.8(a)(9).

Proposed new §70.8(c) provides that the department may refuse permit issuance or renewal to any person who the department has evidence is acting on behalf or as a surrogate for a person who is prohibited from obtaining a permit under the provisions of the proposed new subchapter.

Review of Agency Decision

Proposed new §70.9, concerning Review of Agency Decision, would provide a mechanism for persons who have been denied permit issuance or renewal to have the opportunity have such decisions reviewed by department managers. The proposed new section is intended to help ensure that decisions affecting permit privileges are the result of sound reasoning.

Discontinuation or Amendment of Permitted Activities

Proposed new §70.10, concerning Discontinuation or Amendment of Permitted Activities, would set forth the obligations of a permittee in the event that the permittee permanently ceases operations under a permit or seeks an amendment to the existing permit.

Proposed new §70.10(a) and (b) would require permittees to notify the department at least 14 days prior to the cessation of permitted activities and immediately and lawfully sell, transfer, or destroy, in accordance with a department-approved plan, all exotic aquatic plants for which a permit is required. The proposed new provision is necessary to ensure that the department is timely informed that a permittee has ceased operations and that all stock held under a permit is safely and lawfully disposed of. Proposed new §70.10(b) also would allow the department to order the cessation of permitted activities and the removal of all exotic aquatic plants for which a permit is required or take other appropriate action upon determining that activities cause or are threatening to cause environmental, economic, or health problems, or upon an action by a federal or state agency results in the suspension or revocation of a clearance, permit, or authorization that is required under the provisions of the proposed new subchapter. The proposed new provision is necessary to prevent exotic aquatic plants from creating an environmental, economic, or health problem

Proposed new §70.10(c) requires a permittee to comply with department instructions issued pursuant to the provisions of proposed new §70.10. The proposed new subsection is necessary to prevent exotic aquatic plants from creating an environmental, economic, or health problem.

Escape, Overflow, Toxicity, or Emergency

Proposed new §70.11, concerning Escape, Overflow, Toxicity, or Emergency, would prescribe the requirements for response in the event that an exotic aquatic plant escapes or is discharged from a facility, or toxic properties or conditions are discovered within a facility, or other emergencies. This section is to ensure that in the event of a potential environmental, economic or health problem, permittees take quick responsible and appropriate action and that the department is provided with the information and resources necessary to respond to such a problem.

Proposed new §70.11(a) would stipulate that a permittee is responsible for all costs associated with the detection, control, and eradication of exotic aquatic plants that are released or escape in an unauthorized manner from a facility permitted under the proposed new subchapter. The proposed new provision is necessary to ensure that permittees are aware of the potential financial liability for remediating an escapement from a facility.

Proposed new §70.11(b) would require a permittee to immediately notify the department upon discovering any harmful or toxic properties associated with an exotic aquatic species held under a permit. Such reporting requirements will enable department to intervene to prevent environmental, economic, or health problems that could arise from the discovery of toxic properties associated with an exotic aquatic plant held under a permit.

Proposed new §70.11(c) would allow the department to amend a permit to impose additional conditions or revoke a permit if toxic properties or environmental, economic, or health problems associated with an exotic aquatic plant are discovered during the course of conducting activities under a permit. Such provision will enable the department to respond quickly in the event of the discovery of toxic properties associated with activities performed under a permit.

Proposed new §70.11(d) would require a permittee to immediately notify the department and begin implementation of a department-approved emergency plan in the event that a facility appears to be in imminent danger of overflowing, flooding, or discharging exotic aquatic plants into the water in the state.

Proposed new §70.11(e) would require a permittee to immediately halt all discharges from a facility and notify the department upon discovery of an unauthorized discharge from a facility.

Proposed new §70.11(f) would provide that the department may prescribe recovery, containment, and/or eradication measures to be employed by the permittee as a consequence of being notified of an unauthorized discharge. Such measures are intended to reduce the potential for exotic aquatic species to create environmental, economic, or health problems.

Proposed new §70.11(g) establishes that a permittee is in compliance with the notification requirements if the notification to the department occurs as soon as possible but not later than 24 ours after the permittee discovers an unauthorized discharge or in the exercise of due care should have discovered an unauthorized discharge for which notification of the department is required.

Facility Requirements

Proposed new §70.12, concerning Facility Requirements, would set forth the requirements for the physical infrastructure at facilities where exotic aquatic plants are possessed for specific activities pursuant to a permit.

Proposed new §70.12(a) would require a permittee to allow access by the department to a facility at all times that the facility is in operation. The proposed provision is necessary to enable the department to determine that the facility is in compliance with the proposed new subchapter.

Proposed new §70.12(b) would require all facilities where toxic or genetically modified aquatic plants are possessed to be subject

to greater controls. Additional controls are necessary to reduce the potential for environmental, economic, and health problems.

Proposed new §70.12(c) would require a facility to be designed so as to prevent the discharge of exotic aquatic plants into the water in the state or any water or wastewater stream. The requirement is necessary to prevent environmental, economic, or health problems resulting from the discharge or escape of exotic aquatic plants possessed by a permittee.

Proposed new §70.12(d) would provide that the department may require facilities to employ additional types of containment measures to exclude wildlife vectors and/or the discharge of exotic aquatic plants via airborne propagules. The proposed provision is necessary to address the possibility of wildlife and air currents acting as pathways for the dispersal of exotic aquatic plants held pursuant to a permit.

Proposed new §70.12(e) would require facilities located within the 100-year flood plain to be enclosed within an earthen or concrete dike or levee constructed in such a manner that no section of the crest of the structure is less than one foot above the 100-year flood plain elevation. The proposed new section is intended to implement facility requirements that minimize or eliminate the risk of escape or release of exotic aquatic plants held under a permit.

Proposed new §70.12(f) and (g) would require permittees to employ, operate, and maintain all required devices at all times that exotic aquatic plants are possessed within a facility. Again, the intent of the facility and infrastructure requirements of the proposed new rules is to prevent escape and establishment of certain types of exotic aquatic plants.

Proposed new §70.12(h) would allow the department to approve alternate methods of preventing the discharge of harmful or potentially harmful exotic aquatic plants or their propagules upon a finding that those methods are as or more effective in preventing the discharge of exotic aquatic plants or their propagules from the permitted facility. Because of the wide variety and extraordinary diversity of exotic aquatic plants, and the evolving scientific understanding, it is prudent and appropriate to provide a mechanism for considering alternative methods for preventing the discharge of harmful or potentially harmful exotic aquatic plants, provided the comparative efficacy of those methods is proven to the department's satisfaction.

Labeling, Packaging, and Transport

Proposed new §70.13, concerning Labeling, Packaging, and Transport, would set forth requirements for the identification of exotic aquatic plants possessed under a permit and requirements for the transport of exotic aquatic plants from or to a facility.

Proposed new §70.13(a) would restrict the applicability of the section to exotic aquatic plants that are not on the approved list and are possessed under a permit. The proposed new provision is necessary to clearly identify the exotic aquatic plants to which the proposed new sections apply.

Proposed new §70.13(b) would require an exotic aquatic plants held under a permit to be transported or removed from a facility only if the exotic aquatic plant is being transported to another person or facility, or is being transported for delivery outside this state, the exotic aquatic plant is packaged in accordance with the provisions of the proposed new section, and the exotic aquatic plant is accompanied by a transport invoice for the entire duration of the transport process. The information required by this provision is for the purpose of enabling the department to determine the source and destination of an exotic aquatic plant and determine if it is being possessed and transported in compliance with the proposed new subchapter.

Proposed new §70.13(c) would prescribe the contents of the transport invoice required by proposed new §70.13(a). The transport invoice would be required to be uniquely numbered; identify the date of the shipment; contain the name, address, and phone number of the shipper; the name, address, and phone number of the receiver; the exotic aquatic plant permit numbers of the shipper and receiver; and, if applicable, the aquaculture license number of the shipper and receiver. The information required by the proposed new provision will enable the department to quickly identify the source and destination of shipments of exotic aquatic plants for which a permit is required, and to identify the exotic aquatic plants being transported.

Proposed new §70.13(d) would set forth the packaging and labeling requirements required by proposed new §70.13(a). The proposed new provision would require that all exotic aquatic plants for which a permit is required be packaged and labeled in a specific manner. The proposed new provision would stipulate that no package be greater than three cubic feet in volume, except as authorized in writing by the department; no package is to contain more than one species of exotic aquatic plant, and each package is to be labeled, in English, with the scientific and common name of the species of exotic aquatic plant in the package and the words "Exotic Aquatic Plant."

Proposed new §70.13(e) would prescribe additional labeling and identification requirements for species that have known toxic qualities. Each package of exotic aquatic plant known to have toxic qualities would be required to bear the legend: "Toxic Species--Harmful to Persons, Animals, or the Environment" in 36-point, bold font. The proposed provisions are necessary to inform the public and any regulatory or commercial inspection personnel of the possible toxicity of exotic aquatic plants being transported.

Proposed new §70.13(f) would allow exotic aquatic plants to be transported without a permit by common carrier, provided the common carrier possessed a transport invoice for the entire time the exotic aquatic plant is in the possession of the common carrier. The proposed provision is necessary to avoid burdening businesses with no connection to regulated activities from having to obtain a permit.

Proposed new §70.13(g) would exempt carriers from both the permit and transport invoice requirements of the proposed new section, provided the exotic aquatic plants are being transported from a point outside of Texas to a destination outside of Texas and are not unloaded anywhere in Texas. The proposed new provision would also require exotic aquatic plants to be fully enclosed at all times. The proposed provision is necessary to provide a minimum standard of protection against environmental, economic, and health problems while avoiding the burdening of businesses with no connection to regulated activities from having to obtain a permit or a transport invoice for commercial activities involving interstate transport of exotic aquatic plants that are otherwise unlawful to possess in Texas.

Proposed new §70.13(h) would allow the executive director or his designee to approve alternative means of transporting, labeling, or packaging an exotic aquatic plant if the alternative means are as or more effective in preventing the discharge of the exotic aquatic plant and the alternative means will not sig-

nificantly increase the department's enforcement burden. The proposed new provision is necessary because the department acknowledges that there may be situations or instances in which the provisions of the proposed new section are impractical. The proposed new provision is necessary to address situations or instances in which the provisions of the proposed new section are impractical. The department does not wish to rule out alternatives that allow latitude to the regulated community while preserving the intent of the rules.

Notification, Reporting, and Recordkeeping

Proposed new §70.14, concerning Notification, Reporting, and Recordkeeping, would establish notification, reporting, and recordkeeping requirements in addition to those contained elsewhere in the proposed new subchapter.

Proposed new §70.14(1) would require that all reports, notices, or other documents required by the proposed new subchapter be submitted to the department employee or employees designated on the permit as the department contact. The proposed new section is necessary to ensure that required correspondence is sent directly to the specific employee or employees charged with administering the program.

Proposed new §70.14(2) would stipulate that all records and documents required by the proposed new subchapter are to be promptly provided during normal business hours at the request of a department employee or peace officer acting within the scope of official duties. The proposed new provision is necessary to ensure department access to records and documents to enforce the provisions of the section, to conduct investigations when necessary, and to verify that permittees are in compliance with the provisions of the subchapter.

Proposed new §70.14(3) would require each permittee to submit an annual report accounting for the importation, possession, transport, sale, transfer, or other disposition of any exotic aquatic species handled by the permittee. The proposed new provision is necessary to ensure that the department is able to verify that a permittee is complying with the provisions of the subchapter and as a tool in the event that an investigation is necessary.

Proposed new §70.14(4) would provide that the department may impose recordkeeping and reporting requirements as a permit condition in addition to those contained in the proposed new subchapter. The proposed new provision is intended to provide regulatory flexibility to address unique situations in which the nature of an activity or the species involved necessitates additional reporting measures.

Proposed new §70.14(5) would require a permittee who ships or receives any exotic aquatic plant to retain a copy of each transport invoice for a period of two years from the date of delivery of the shipment. The proposed new provision is necessary to facilitate investigations when necessary. The two-year period was selected because that is the statute of limitations for an offense under the subchapter.

Approved Exotic Aquatic Plants

Proposed new §70.15, concerning Approved Exotic Aquatic Plants, would set forth the scientific and common (if one exists) names of those species the department has determined do not pose environmental, economic, or health problems and which no permit is required for possession or importation. The department has developed an exhaustive risk analysis that evaluates individual plants on the basis of several different factors in order to determine the probable biological dangers to be expected with respect to that plant.

HB 3391 required the department, in developing the approved list to "develop a process to evaluate the potential harm that may be caused by the importation or possession of exotic aquatic plant species in to this state." Texas Parks and Wildlife Code, §66.007(n). Therefore, department scientists adapted a risk-assessment model (Pheloung et al. 1999) that has been widely used throughout the world to assess the risks associated with the introduction of exotic plants in native ecosystems. The risk assessment model uses a scoring system based on 49 questions concerning specific biological and ecological characteristics of a given exotic aquatic plant, such as degree of domestication, climatic suitability, hardiness, distribution, undesirable traits, reproductive characteristics, dispersal characteristics, and persistence to predict the degree of invasiveness of the plant. The model ranks a plant to indicate relative risk. A score of 0 or less indicates that a plant is an acceptable risk. A score of from 1 to 6 indicates that further evaluation is required, and a score above 6 indicates a higher risk of invasiveness. For species scoring from 1 to 6, the department further evaluated each according to the following factors: evidence of invasiveness in the U.S.; agricultural or other economic value; repeated introductions without establishment or evidence of invasiveness; and history of survival and economic benefit in Texas without invasiveness. Species that showed a high probability of being benign when assessed under these criteria are considered an acceptable risk. Plants that were evaluated and considered to be an acceptable risk were included on the approved list. To ensure the integrity of the assessment, the department contracted with the Texas Invasive Plant and Pest Council to independently review the methodology for the risk assessments for each species assessed by the department. The risk assessment model used to evaluate exotic aquatic plants, along with the scores of each plant that was evaluated, is available on the department's Internet web site at www.tpwd.state.tx.us.

In order to develop a list of species for evaluation, the department conducted an extensive outreach effort to identify exotic aquatic plants in trade in Texas. This process resulted in the identification of 496 species for evaluation. Of these species, 219 species were placed on the approved list, 60 were rejected, 27 were neither placed on the approved list nor rejected due to insufficient scientific information, 60 were determined to be erroneously identified by the submitting agent, 121 were determined to be native or naturalized, and 9 were determined to be terrestrial plants.

Amendment of List of Approved Species

Proposed new §70.16, concerning Amendment of List of Approved Species, would provide a mechanism for requesting that a new species be added to the approved list. Subsections (a) - (c) of the proposed new section would require a person making such a request to complete an application on a form supplied or approved by the department and furnish the department with a risk assessment of the plant in question. If the department concludes that an exotic aquatic plant should be added to the approved list, the department would engage in rulemaking to effect that change. If the department concludes that the species should not be added to the approved list, the applicant will be notified. Subsection (d) of the proposed new section would require the department to deny an application for insufficient information or evidence that as to whether or not the species will result in environmental, economic, or health problems. The pro-

posed new provisions are necessary to allow persons to suggest species for the approved list under a standardized methodology of evaluation. Subsection (e) of the proposed new section would provide that an application to add a species to the approved list will not be considered if the species on the ineligible species list, unless the applicant submits new information. Subsection (f) of the proposed new section would provided for the department to recommend to the Parks and Wildlife Commission the removal of a species from the approved list if the department determines that the species threatens to cause environmental, economic, or health problems. Proposed new subsection (f) also references the department's emergency rulemaking authority.

Prohibited Acts

Proposed new §70.17, concerning Prohibited Acts, would provide information about the specific offense for violating a provision of the proposed new subchapter or a condition of a permit issued under the proposed new subchapter, and a specific offense for any person to possess any species of exotic aquatic plant or its propagules unless the species is on the approved list or the person is specifically authorized to possess the species by a permit issued under authority of the proposed new subchapter.

Temporary Transition Provisions

Proposed new §70.18, concerning Temporary Transition Provisions, would create special provisions to address situations arising from implementation of the proposed new rules. If the proposed new subchapter is adopted by the Commission, the department intends for the new provisions to go into effect on May 1, 2011.

Proposed new §70.18(a) would allow a person who submits an application to add a species to the approved list on or before July 31, 2011 to continue to possess that species until the department either adds the species to the approved list or rejects the application, so long as the species is not on the ineligible species list.

Proposed new §70.18(b) would allow a person who submits an application for an exotic aquatic plant permit on or before July 31, 2011 to continue to possess, without a permit, the exotic aquatic plants for which the permit is sought, until the department makes a decision to either issue or deny the permit, unless the exotic aquatic plant is on the ineligible list. The proposed provision is necessary because it is possible that people are in current, lawful possession of exotic aquatic plants that would be unlawful to possess under the proposed new rules; therefore, the department seeks to create a mechanism that would make such possession temporarily lawful until the department makes a decision to either issue or deny the permit.

Proposed new §70.18(c) would allow a person who on April 30, 2011 has a department-issued permit to possess a species of exotic aquatic plant that is not on the approved list to continue to engage in activities authorized by the permit so long as the person submits an application for an exotic aquatic plant permit on or before July 31, 2011 and continues to comply with the conditions of the permit in effect on April 30, 2011. The proposed provision is necessary to provide a mechanism for persons who currently possess exotic aquatic plants under an exotic species permit issued under the authority 31 TAC Chapter 57, Subchapter A, to continue lawful possession until an exotic aquatic plant permit issued under the proposed new subchapter can be obtained.

Proposed new §70.18(d) would require an applicant or permittee who possesses an exotic aquatic plant species pursuant to the proposed new section to dispose of any exotic aquatic plants in the applicant's or permittee's possession in accordance with proposed new §70.12, concerning Discontinuation of Permitted Activities, if the department denies an application for an exotic aquatic plant permit or an application to add a species to the approved list. The proposed new provision is necessary to provide for the safe destruction of exotic aquatic plants that become unlawful to possess for whatever reason.

Proposed new §70.18(e) establishes an expiration date May 1, 2012, for the proposed new section, which is necessary because the department intends to have completed the evaluation and transition process by that time.

Violations and Penalties

Proposed new §70.19, concerning Violations and Penalties, would state the statutory penalties for violation of the proposed new rules. The proposed new section is necessary to provide an easy-to-find reference for law enforcement purposes.

Gary Saul, Ph.D., Director of the department's Inland Fisheries Division, has determined that for each year of the first five years that the rules as proposed are in effect, there will not be fiscal implications for state or local government as a result of administering or enforcing the rules.

Dr. Saul also has determined that for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the enhanced protection of the state's native ecosystems and the recreational and commercial economies that depend upon those ecosystem the threat of establishment of exotic aquatic plants.

There will be economic costs for persons required to comply with the rule as proposed, if the person chooses to possess or import species of exotic aquatic plants that are not on the approved list and can only be possessed under a permit. The primary economic cost will be the fee for an exotic aquatic species permit ($263). The fee is based on the historical cost to the department of processing applications for permits to possess species on the current prohibited list and performing the required facility inspection. In addition, depending on how a person chooses to comply with the proposed rules, there may be additional costs. These costs are explained in greater detail below.

Under the provisions of Texas Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic affect on small businesses and microbusinesses. As required by Texas Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and microbusinesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement the result of which would be a directly imposed cost related to compliance, such as recordkeeping and/or reporting; required professional expertise (such as legal, accounting, or engineering); capital costs for any required equipment or modifications to existing processes and procedures; lost sales and profits; changes in market competition; extra tax costs; additional employment requirements; or required fees.

Impacted Small and Microbusinesses

Businesses that would be required to comply with the provisions of the proposed rules are not currently required to provide information to the department regarding gross sales or number of employees. To attempt to determine the number of small and microbusinesses affected by the proposed rules, the department contacted persons and organizations known to be active in or knowledgeable about the exotic aquatic plant trade and developed a representative list of persons and businesses that could be affected.

The department then mailed a survey to the listing of persons and business that could be affected, requesting information regarding workforce numbers, gross annual receipts, and the species of exotic aquatic plants grown, bought, and/or sold. A total of 166 surveys were mailed. In addition to information necessary to determine if the business is a small or microbusiness, the surveys asked respondents to list the name, and the quantity of exotic aquatic plants that are not on the proposed approved list that the business currently sells, purchases and/or grows, or plans to sell, purchase and/or grow, along with the estimated dollar value realized by the business's trade in the species.

The department received 29 survey responses, 27 of the businesses that responded were determined to qualify as small or microbusinesses. Of the 27 respondents determined to be small or microbusinesses, 13 indicated that they did not at present, and did not intend in the future, to grow, buy, or sell any exotic aquatic species that is not on the proposed approved list. Two respondents' submitted lists of species that consisted entirely of plants that are either native, naturalized, or on the approved list, which means the proposed new rules would not have an impact. The remaining 14 respondents indicated that they grow, buy, or sell, or intend to grow, buy, or sell, exotic aquatic plants for which a permit would be required under the proposed new rules, and identified those species and the current or expected sales volumes associated with each.

Permit Fee, Recordkeeping, and Reporting

To obtain an exotic aquatic plant permit under the proposed rules, a person would be required to pay a fee of $263 and submit application materials describing the species, activities, and facilities to be covered by the permit and an emergency plan addressing the permittee's actions in the event of an emergency. The proposed rules also would impose labeling, packaging, transportation, and reporting and recordkeeping requirements.

The permit fee is a fixed cost to all permittees, and is the fee imposed under current rule for persons who possess or culture exotic species such as shrimp and water spinach. The department calculated the fee based on historical administrative and law enforcement costs, but the bulk of the fee is intended to recoup the expense to the department of conducting the facility inspection required by the proposed new rules.

The adverse economic impact to an applicant in compiling or developing the information required on the application for an exotic aquatic plant permit (a description of the species to be possessed, the activities to be engaged in, the facilities to be used, and an emergency plan addressing the permittee's actions in the event of an emergency) is estimated to be less than $100. The department believes that most if not all information required on an application will be information that the applicant has already developed as part of normal business practices and that the chief expense would be the collation of the material. With respect to the development of an emergency plan, the department believes that most if not all operations that will take place under an exotic aquatic species permit will be very similar in nature; therefore, the department will make available a model emergency plan and provide a list of components of an emergency plan, which should make it unnecessary for any affected party to engage outside expertise.

The adverse economic impact of the reporting and recordkeeping requirements of the proposed new rules cannot be exactly determined; however, the department believes that they should not exceed more than $100 per year. The primary expense is the required annual report that must account for the importation, possession, transport, sale, transfer, or other disposition of any exotic aquatic plant handled by the permittee during the reporting period. The department has determined that since under ordinary business practices this information already would have been collected, the expense to the permittee to collate the information and enter it on a department supplied form should not cost more than $100 per year.

The adverse economic impact to small and microbusinesses of complying with the labeling, packaging, and transportation requirements of the proposed new rules will vary. The proposed rules require exotic plants to be packaged and labeled when being transported and sets for specific packaging and labeling requirements. However, because of the variety of plants and their various uses (landscaping, food, cosmetics, etc.), as well as the transportation of exotic aquatic plants in various stages of processing, the proposed new rules also provide that the department may approve alternative packaging requirements. In practical terms, this means that the department will work with each permittee to devise a system of packaging that allows the department to effectively determine the identity and volume of exotic species being transported.

Shipments of exotic aquatic plants will be required to be labeled. As with the packaging requirements, the proposed new rules will allow alternative labeling requirements that will enable the department to impose effective labeling requirements while trying to minimize inconvenience to the regulated community. On this basis, the department estimates that the cost of complying with labeling and packaging requirements will be minimal and probably less than $200 per year.

Facility Requirements

If applicable, the proposed new rules would require a facility to be constructed in such a way as to prevent the discharge of exotic aquatic plants possessed under a permit. In those cases in which a facility is not an enclosed facility but is located within the 100-year flood plain, the proposed rules would require the construction of a dike or levee with a crest not less than one foot above the 100-year flood plain. These costs are dependent on the size and scope of regulated activities, and are associated with required professional expertise (construction/engineering); capital costs for modifications to existing processes and procedures; lost sales and profits; and changes in market competition.

The adverse economic impact to small and microbusinesses of the proposed new rules with respect to required professional expertise and capital costs for modifications of facilities are associated with meeting the requirements related to the prevention and control of overflow or flood events. The proposed new rules would require an applicant to provide sufficient information for the department to determine the effectiveness of a facility with respect to preventing the discharge of exotic aquatic plants into the environment. Most if not all facilities that the de-

partment is aware of are enclosed facilities (i.e., indoor facilities such as greenhouses). However, if an applicant's facility is an open facility and is deemed insufficient for preventing or controlling discharges of exotic aquatic plants, it is possible that the applicant would be faced with expenses related to construction in order to comply with the requirements of the proposed new subchapter. The department notes that if a facility is capable of discharging water or wastewater into water in the state, it must comply with the regulations of the Texas Commission on Environmental Quality (TCEQ), which in most cases will mean that the facility would have to meet TCEQ requirements, regardless of the requirements the proposed new rules anyway. However, it is possible that in some cases drainage systems or other infrastructure may need to be installed or improved in order for a facility to be permitted. The department estimates this cost at $2,500 per facility or less. This estimate was derived by using department construction information related to fish hatchery construction, specifically, trenching and burying of culverts, which is the typical method for draining or diverting water. The department notes that because such facilities have not been regulated by the department to the extent provided in this proposed rulemaking, and may vary significantly in size, dimension, elevation, and other considerations, there may be instances in which costs for drainage installation or improvement could exceed $2,500. It should also be noted that many, if not all of these facilities would be required to address discharge pursuant to statutes and regulations administered by the TCEQ. As a result, in those instances, such costs are not necessarily required solely because of the proposed regulations.

Additionally, another requirement of the proposed new rules would stipulate that all unenclosed facilities located within the 100-year floodplain be surrounded by a dyke or levee with a crest not less than one foot above the 100-year flood plain level. The department estimates that the cost of compliance with this provision is approximately $45 per linear foot. This estimate was derived by using department data for the construction of earthen retention structures at department fish hatcheries, which serve a similar purpose. The estimate assumes an embankment 16 feet wide at the top, and 50 feet wide at the base, and 9 feet high, which the department believes is far more than would be required for compliance with the proposed new rules anywhere in the state. The estimate was calculated based on the volume of material that would have to be excavated, hauled, filled and, compacted, and assumes that suitable soils are available on-site. If material has to be excavated elsewhere and hauled to the site, the cost will be higher; however, that cost will vary based on the availability and location of suitable material.

Lost Sales and Profits

The proposed new rules will in some cases result in adverse economic impacts to small and microbusinesses as a result of lost sales and profits, but are not expected to alter market competition. The average per-business value of exotic aquatic plants affected by the proposed new rules, as reported by respondents to the department's survey, was $21,147.86. Out of the 14 businesses reporting, three reported sales of affected plants of between $90,000 and $40,000 per year (primarily consisting of one species, *Colocasia esculenta,* a species of *Colocasia,* often referred to as "elephant ear"); six reported sales of affected plants of between $30,000 and $9,000 per year; and the remaining five businesses reported sales of affected species under $1,500 per year. If the affected small and microbusinesses cease possessing, buying, and selling the species for which a permit is required, the department estimates that the adverse economic impact in loss of sales to small and microbusinesses would be between $90,000 and $100, depending on the volume of trade in affected plant species. This impact also assumes that sales of approved plants would not be substituted for the plants that could no longer be sold. The department also notes that the proposed rules do not prohibit the sale of regulated exotic aquatic plants to buyers outside of the state, so it is possible that there will be no loss of sales or a reduced loss of sales for small and microbusinesses who sell all or part of their inventory to out-of-state buyers.

Other Impacts

With respect to alteration of market competition, the proposed new rules apply a uniform standard to all businesses, including small and microbusinesses, in the state that engage in the possession, purchase, and sale of exotic aquatic plants and neither confer advantages to nor deprive advantages from one type of business versus another.

The department has determined that rules as proposed will not result in a need for small and microbusinesses to hire additional employees. The reporting and recordkeeping requirements rely on data that is ordinarily collected as part of normal business practices. The packaging and labeling costs can to some extent be minimized by tailoring permit provisions. Any other requirements, such as additional professional expertise, are not ongoing expenses that would entail hiring additional permanent employees.

Alternatives

The department considered several alternatives to the rules as proposed. One alternative considered was to allow all exotic aquatic plants currently in trade to remain in trade without permit requirements. This alternative was rejected because the department's risk-assessment model indicated that there are exotic aquatic plants currently in trade, such as *Colocasia esculenta,* that have the potential to cause or have caused environmental, economic, or health problems and therefore must be regulated. To allow those species to be possessed without a permit would defeat the purpose of the rules. Another alternative considered was to create separate facility requirements. This alternative was rejected because the risk of environmental, economic, and health problems associated with plants identified by the risk analysis as being problematic would be increased to an unacceptable level, which defeats the purpose of the proposed new rules.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Texas Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that the proposed rule is not a "major environmental rule" requiring a regulatory impact analysis under the Administrative Procedure Act, Texas Government Code, §2001.0225. These rules are specifically required by state law. Texas Parks and Wildlife Code, §66.007(c) requires the department to make rules to carry out the requirement of Texas Parks and Wildlife Code, §66.007, regarding harmful or potentially harmful fish, shellfish and aquatic plants. In addition, Texas Parks and Wildlife Code §66.007 requires the department to compile a list of exotic aquatic plants that are approved for possession in the state and requires the commission to exercise fi-

nal authority over the list of approved plants. As a result the proposed rules are not considered "major environmental rule."

Comments on the proposed rules may be submitted to Ken Kurzawski, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4591 (e-mail: ken.kurzawski@tpwd.state.tx.us).

The new rules are proposed under the authority of Texas Parks and Wildlife Code, §66.007, which requires the department to make rules to carry out the provisions of that section.

The proposed new rules affects Texas Parks and Wildlife Code, Chapter 66.

§70.1. Applicability.

(a) This subchapter governs the possession of exotic aquatic vascular plants and macroalgae in this state.

(b) Unless otherwise expressly provided herein, to the extent that any provision of this subchapter conflicts with the provisions of Chapter 57, Subchapter A of this title (relating to Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants) the provisions of this subchapter shall prevail.

(c) This subchapter is not applicable to the possession of water spinach. The possession of water spinach shall be governed by the provisions of §57.136 of this title (relating to Special Provisions--Water Spinach).

(d) Unless otherwise expressly provided herein, this subchapter is not applicable to the possession of exotic microalgae. The possession of exotic microalgae shall be governed by the provisions of Subchapter B of this chapter (relating to Exotic Microalgae).

(e) Nothing in this subchapter shall be construed to relieve any person from compliance with the requirements of any applicable federal, state, or local law.

§70.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Approved list--The exotic aquatic plant species listed in §70.15 of this title (relating to Approved Exotic Aquatic Plants) that a person may possess in this state without a valid permit.

(2) Aquatic plant--

(A) An aquatic plant is any member of the Kingdom Plantae (as defined by the Integrated Taxonomic Information System) within the taxonomic units listed in this paragraph that is normally found in either aquatic or riparian habitats, including:

(i) Division Anthocerotophyta;

(ii) Division Bryophyta (mosses, certain hornworts);

(iii) Division Charophyta (stoneworts);

(iv) Division Chlorophyta (green algae);

(v) Division Chrysophyta (golden-brown algae);

(vi) Division Craspedophyta;

(vii) Division Cryptophycophyta;

(viii) Division Euglenophycota;

(ix) Division Haptophyta;

(x) Division Hepatophyta (liverworts);

(xi) Division Phaeophyta (brown algae);

(xii) Division Prasinophyta (green flagellates);

(xiii) Division Pyrrophycophyta (dinoflagellates);

(xiv) Division Rhodophyta (red algae);

(xv) Division Xanthophyta (yellow-green algae);

(xvi) Subkingdom Tracheobionta (vascular plants); and

(xvii) Subkingdom Chromista, Division Bacillariophyta (diatoms).

(B) The term "aquatic plant" includes any part of an aquatic plant in any stage of the plant's life history, including propagules.

(3) Commission--The Texas Parks and Wildlife Commission.

(4) Controlled facility--A facility in which exotic aquatic plants at all times under normal conditions are protected, at a minimum, by a building or vessel that effectively surrounds and encloses the plant and includes features designed to restrict the plant from leaving.

(5) Department--The Texas Parks and Wildlife Department.

(6) Director--The executive director of the department, or designee.

(7) Discharge--To deposit, conduct, drain, emit, throw, or run; allow to seep, escape, or spread; or otherwise release or dispose of or to allow, permit, or suffer any of these acts or omissions by any means, including, but not limited to discharge as a result of flooding or overflow.

(8) Exotic aquatic plant--An aquatic plant that is not native or naturalized.

(A) For purposes of this subchapter, the term also includes:

(i) a genetically modified, genetically engineered, or transgenic plant derived from the genetic material of an aquatic plant; and

(ii) a hybrid species in which one or more parent species is an exotic aquatic plant.

(B) For purposes of this subchapter only, the term does not include exotic aquatic plants that are microalgae. (See, Subchapter B of this chapter (relating to Exotic Microalgae) for provisions regarding Microalgae).

(9) Facility infrastructure--All areas, structures or equipment that are used to grow, hold, store, process, package, or contain exotic aquatic plants, growth media, or nutrient or waste streams including, but not limited to buildings, ponds, raceways, bioreactors, vats, greenhouses, processing areas, netting, screening or other containment measures or equipment, water supply, drainage, outfalls, and stormwater management structures.

(10) Ineligible species list--A list of species maintained by the department of exotic aquatic plants that are not eligible for inclusion on the approved list. The ineligible species list includes the following:

(A) species known to be toxic;

(B) species known to cause environmental, economic, or health problems; and

(C) species that have been considered for addition to the approved list and rejected on the basis of a risk determination indicating that the species has the potential to cause environmental, economic, or health problems.

(11) Macroalgae--Macroscopic non-vascular aquatic plants.

(12) Microalgae--Microscopic photosynthetic aquatic plants.

(13) Native--A species of aquatic plant of which the first documented occurrence in water in the state of Texas or the western Gulf of Mexico was not the result of known intentional or unintentional introduction by man.

(14) Naturalized--A non-native aquatic plant that does not require human assistance to reproduce and maintain itself over time in an area where it is not native. For the purposes of this subchapter, this term is limited to species that have become integrated into a stable and diverse environmental community, and does not include plants that invade, dominate, or cause a substantial reduction in native species or facilitate the eradication of native species.

(15) Nonindigenous--Not native or naturalized to water in the state or the western Gulf of Mexico.

(16) Nonviable--Permanently incapable of spreading, propagating, or being propagated.

(17) Permit--A permit that authorizes the possession of exotic aquatic plants issued pursuant to the provisions of this subchapter, unless otherwise provided.

(18) Permittee--A person or entity to whom a permit has been issued.

(19) Possess--A status of care, custody, or control that includes, but is not limited to acquiring, holding, displaying, propagating, selling, offering for sale, purchasing, transporting, importing, exporting or placing into water in the state.

(20) Propagate--To multiply by sexual or asexual reproduction, including by natural or human causation.

(21) Propagule--Any biological structure capable of propagating an aquatic plant.

(22) Toxic--Containing or producing poisonous material at a level or concentration capable of causing death or bodily injury to humans or causing death or debilitation to animals or plants.

(23) Water in the state--Water in the state as defined in Chapter 26, §26.001(5) of the Texas Water Code.

(24) Western Gulf of Mexico--That area of the Gulf of Mexico west of a line beginning at the Mississippi River Southwest Pass Entrance (N29°54'00.3", W89°25'54.3") then proceeding southward to the Yucatan Peninsula (approximately 16.2 miles east of Progresso, Mexico), and westward, including the Bay of Campeche, to the mainland of Mexico, Texas, and Louisiana including the areas of salt and brackish waters of bays, lagoons and tidal bayous.

§70.3. General Provisions.

(a) Permit Required. Except as otherwise provided in this subchapter, no person may possess in this state any species of exotic aquatic plant that is not listed in §70.15 of this title (relating to Approved Exotic Aquatic Plants) unless the person possesses a valid permit issued by the department authorizing such possession.

(b) No Permit Required. No permit is required to:

(1) possess an exotic aquatic plant species that is listed in §70.15 of this title (relating to Approved Exotic Aquatic Plants);

(2) possess a hybrid species in which all parental species are native or naturalized aquatic plants, and/or are listed in §70.15 of this title;

(3) possess an exotic aquatic plant species contained in ship-borne ballast water or attached to a ship in the Gulf of Mexico, so long as such possession is not an effort to avoid regulatory compliance under this chapter, provided; however, nothing this subsection shall be construed to relieve a person of the obligations under Parks and Wildlife Code, §66.0071;

(4) possess a native or naturalized aquatic plant; or

(5) possess an exotic aquatic plant shown to be nonviable.

(c) Taxonomic Criteria.

(1) Scientific reclassification or change in nomenclature of taxa at any level in taxonomic hierarchy, or the use of synonyms for an exotic aquatic plant species or other grouping will not, in and of itself, result in a change in the regulatory status of an exotic aquatic plant species.

(2) Consideration of an exotic aquatic plant species for the approved list will be at a level no higher than the taxonomic rank of species on the hierarchy of biological classification.

(3) An application for a permit authorizing the possession of an exotic aquatic plant pursuant to this subchapter shall identify each exotic aquatic plant to be possessed at a level no higher than the taxonomic rank of species on the hierarchy of biological classification.

(d) Plant Identification. Upon request of a department employee acting within the scope of official duties, a permittee shall provide samples of any vascular aquatic plant or macroalgae to the department for identification and analysis.

(e) Ineligible List Species. The department shall maintain a list of ineligible species. The list shall be readily available to the public, including availability on the department's internet web site.

§70.4. Types of Exotic Aquatic Plant Permits.

(a) The department may issue a permit for any of the purposes described in this section.

(1) Scientific Research. The department may issue a permit for scientific research purposes only to an independent researcher with a department-approved research proposal or to an employee, representative, or agent of a research entity with a department-approved research proposal.

(2) Industrial/Commercial Production. The department may issue a permit for the production of foodstuffs for human or animal consumption, biofuel, chemicals, nutraceuticals, pharmaceuticals, and cosmetics, or other manufactured products, or for propagation and interstate sale and transport.

(3) Management and Control. The department may issue a permit for the production of bio-control organisms, for removing and disposing of invasive exotic aquatic plants, and for other applications related to the use of exotic aquatic plants in the management of invasive exotic aquatic plant species.

(4) Wastewater Treatment. The department may issue a permit for the use of exotic aquatic plants in wastewater treatment facilities.

(5) Educational/Botanical. The department may issue a permit for activities conducted for the purposes of encouraging

management and conservation of plants and other natural resources and furthering awareness and understanding among the general public of the biology of plants and other natural resources.

(b) The department will not issue a permit authorizing the sale of an exotic aquatic plant species that is not on the approved list, except for sale to a source outside the state of Texas or to another person authorized by a permit issued under this subchapter to possess the exotic aquatic plant species.

§70.5. Permit Application.

(a) Form. An applicant for a permit shall submit a complete application on a form supplied or approved in writing by the department.

(b) Administratively Complete Application. The department will not process an application for a permit to possess exotic aquatic plants and will not consider the application to be administratively complete unless it includes, at a minimum:

(1) a complete list of the species the applicant seeks to possess;

(2) the native range and distribution of each of the species the applicant seeks to possess;

(3) a description of all activities the applicant seeks to conduct;

(4) a description of where and how species will be contained and of control measures in place to prevent discharge of exotic aquatic plants;

(5) the fee required by Chapter 53 of this title (relating to Finance); and

(6) any additional information reasonably requested by the department to evaluate the application.

(c) Propagation. If an applicant seeks to propagate an exotic aquatic plant for which a permit is required under this subchapter, the following information is required on an application, in addition to the information otherwise described in this section:

(1) the following information regarding discharges into water in the state:

(A) evidence that the applicant possesses the appropriate valid wastewater discharge authorization or has received an exemption from the Texas Commission on Environmental Quality; or

(B) documentation demonstrating that the facility is designed and will be operated at all times in a manner such that no discharge into or adjacent to water in the state will, or is likely to, occur.

(2) the name, physical address and telephone number of the owner of the property or properties where prospective activities will take place;

(3) a written emergency plan describing the course of action to prevent and respond to an unauthorized discharge of exotic aquatic plants into the water in the state; and

(4) documentation demonstrating that the facility complies with the provisions of §70.12 of this title (relating to Facility Requirements), including, but not limited to, a schematic of the facility that specifically includes and clearly identifies the following:

(A) the location and functional identification of all facility infrastructure;

(B) all structures that drain the facility, including but not limited to all points at which effluent of any kind is or may be discharged from the facility;

(C) all structures or equipment designed or intended to prevent escapement of exotic aquatic plants or their propagules from the facility; and

(D) sufficient information for the department to determine the effectiveness of facility system(s) at preventing discharge of the exotic aquatic plant for which a permit is requested outside of the facility including, at a minimum, a description of the material to be used and a schematic or other description of how the system is to be deployed.

§70.6. Permit Issuance, Renewal, or Amendment.

(a) A permit issued by the department shall be issued to a named individual. If the permit is being sought by an individual on behalf of an entity, including, but not limited to a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity, the entity shall be named as a co-permittee. All individuals and entities listed on the permit shall be responsible for compliance with this subchapter and the conditions of the permit.

(b) The department may issue or renew a permit upon finding that:

(1) the applicant has met all of the application requirements of this subchapter for issuance or renewal of a permit; and

(2) the applicant has complied with all applicable provisions of this subchapter and, if a renewal application, the conditions of a previous or current permit.

(c) Except during the temporary transition period established under §70.18 of this title (relating to Temporary Transition Provisions), the department will issue or deny a new or renewed permit within 90 calendar days of receiving an administratively complete permit application. If the department is unable to issue or deny issuance of a permit within the 90-day period provided in this subsection, the department may extend the period for issuing or denying a permit by an additional 30 calendar days by informing the applicant in writing of the reason for the delay.

(d) If the department does not act to deny or issue a permit renewal or amendment within the time periods specified in this section, the permit will be considered renewed or amended upon the expiration of the time periods specified in subsection (c) of this section.

(e) In connection with an application to issue or renew a permit, the department may direct that a facility inspection be conducted by department personnel during the permit review period described in subsection (c) of this section to determine whether the facility is in compliance with the provisions of this subchapter.

(f) The department may issue a letter to a potential permit applicant provisionally approving a planned facility if the following conditions are met:

(1) the applicant submits a completed permit application, including all required information;

(2) the application meets all requirements for permit issuance, other than the requirement to obtain a facility inspection; and

(3) the applicant submits facility plans and specifications to the department demonstrating that the planned facility will meet all applicable facility requirements of this subchapter.

(g) If the department issues a letter to a potential permit applicant provisionally approving a planned facility, the department is not precluded from denying permit issuance if:

(1) the facility is not constructed within a reasonable period, not to exceed two years, after issuance of the letter;

(2) the facility, as constructed, materially differs from the facility as planned, and does not meet the facility requirements of this subchapter; or

(3) the information provided in and with the permit application materially changes after the issuance of the letter.

(h) A permittee must submit an application for a permit amendment prior to making any material changes in the conditions, facilities or activities addressed in the permit. A permittee shall not implement any material changes in the conditions, facilities or activities addressed in the permit until a permit amendment authorizing such changes has been approved by the department. The application for a permit amendment must include the following, at a minimum:

(1) an accurate narrative description of all planned material changes in the conditions, facilities or activities addressed in the permit; and

(2) modified documents required to be submitted for the initial permit under §70.5 of this title (relating to Permit Application) in which any material changes in the conditions, facilities or activities are clearly marked.

§70.7. Permit Privileges, Restrictions, and Term.

(a) Privileges and Restrictions. A permit issued pursuant to the provisions of this subchapter:

(1) authorizes the permittee named on the permit to conduct only the specific activities at the places and times identified in the provisions of the permit;

(2) is valid only for the species and activities set forth in the permit; and

(3) is not transferable.

(b) Term. A permit issued under this subchapter shall be valid for one year from the date of issuance of the permit.

§70.8. Denial of Issuance or Renewal.

(a) The department may refuse permit issuance or renewal based on the following:

(1) the application does not meet the requirements for a permit under this subchapter or other law;

(2) the applicant has failed to provide enough information or there is not enough information available to the department to make a determination that the proposed use of the plant will not result in environmental, economic, or health problems;

(3) the applicant or permittee has failed to comply with the conditions of a previous permit issued by the department, including, but not limited to reporting requirements;

(4) the applicant is delinquent in submitting any funds owed to the department;

(5) the applicant's permit has been suspended pursuant to Family Code, Chapter 232;

(6) the applicant has made a false statement or material misrepresentation to the department in connection with applying for or renewing the permit;

(7) the applicant has refused to provide information requested by the department pursuant to this subchapter;

(8) the applicant has failed to provide all of the applicant's criminal history information in response to the department's request for information; or

(9) the applicant or permittee has been convicted, pleaded nolo contendere, received deferred adjudication or pretrial conversion, or assessed a civil penalty, if applicable, for a violation of:

(A) this chapter;

(B) Chapter 57, Subchapter A or C of this title (relating to Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants; or Mussels and Clams);

(C) Parks and Wildlife Code that is a Class A misdemeanor, a Class B misdemeanor, or felony; or

(D) 16 U.S.C. §§3371-3378 (the Lacey Act).

(b) The department may withhold the processing of a permit or renewal application if the applicant is a defendant in a criminal prosecution or proceeding to assess a civil penalty, if applicable, for a violation of:

(1) this chapter;

(2) Chapter 57, Subchapter A or C of this title;

(3) Parks and Wildlife Code that is a Class A misdemeanor, a Class B misdemeanor, or felony; or

(4) 16 U.S.C. §§3371-3378 (the Lacey Act).

(c) The department may refuse to issue a permit to any person the department has evidence is acting on behalf of or as a surrogate for another person who is prohibited by the provisions of this subchapter from engaging in permitted activities.

§70.9. Review of Agency Decision.

An applicant for a permit under this subchapter may request a review of a decision of the department to deny issuance or renewal of a permit or to withhold processing of a permit.

(1) An applicant seeking review of a decision of the department to deny issuance or renewal of a permit or to withhold processing of a permit shall request a review by notifying the department in writing within 10 working days of being notified by the department of the decision to deny or withhold the permit.

(2) The request for review shall be presented to a department review panel within 30 days after receipt of the request for review. The review panel shall consist of the following:

(A) the Deputy Executive Director for Natural Resources, or designee;

(B) the Director of the Inland Fisheries Division, or designee; and

(C) the Director of the Coastal Fisheries Division, or designee.

(3) The applicant may appear before the review panel and make arguments.

(4) The review panel's consideration of the review will be an informal process at which neither the Rules of Evidence nor the Rules of Civil Procedure will apply. The department may dictate informal procedural requirements to ensure the orderly conduct of the review.

(5) The decision of the review panel is the final department decision.

(6) The deadlines provided in this section may be extended by mutual written agreement of the applicant and the department.

§70.10. Discontinuation of Permitted Activities.

(a) If a permittee permanently ceases permitted activities, the permittee must:

(1) notify the department at least 14 days prior to the cessation of operation of permitted activities in compliance with the provisions of §70.14 of this title (relating to Notification, Reporting, and Recordkeeping); and

(2) lawfully sell, transfer, or destroy all exotic aquatic plants for which a permit under this subchapter is required in accordance with a plan submitted to and approved in writing by the department, which may require, among other actions, excavation or dewatering of a facility, and/or physical or chemical treatment or destruction of plants.

(b) The department may order the immediate cessation of permitted activities and/or the removal of all permitted exotic aquatic plants from a facility or take other appropriate action upon:

(1) a determination that activities under the permit are causing or threatening to cause environmental, economic, or health problems; or

(2) an action by a federal or state agency resulting in the suspension or revocation of a clearance, permit, or authorization that is required under this subchapter as a condition of permit issuance.

(c) The permittee shall comply with instructions of the department regarding the handling of the exotic aquatic plant species, issued pursuant to this section.

§70.11. Escape, Overflow, Toxicity, or Emergency.

(a) In the event that an exotic aquatic plant is discharged from a facility in a manner not authorized by a permit or this subchapter, the permittee, or, in the case of an illegal operation, the facility operator, is responsible for all costs associated with the detection, control, and eradication resulting from such discharge.

(b) If previously unknown toxic properties or environmental, economic or health problems associated with a species possessed under a permit are discovered during the course of conducting activities under the permit, the permittee must immediately report such properties or problems to the department.

(c) The department may amend a permit to impose additional conditions or may revoke the permit if toxic properties or environmental, economic, or health problems associated with an exotic aquatic plant possessed under a permit are discovered during the course of conducting activities under the permit.

(d) In the event that a facility appears in imminent danger of overflowing, flooding, or discharging exotic aquatic plants into the water in the state, the permittee must immediately:

(1) notify the department; and

(2) begin implementation of the department-approved emergency plan.

(e) Upon discovery of a discharge from a facility in a manner not otherwise authorized by a permit or this subchapter, regardless of the cause, the permittee must immediately:

(1) halt all discharge from the facility; and

(2) notify the department of the discharge.

(f) Upon receiving notification required under subsection (d) or (e) of this section, the department will prescribe recovery, containment, and/or eradication measures to be employed by the permittee and the permittee must implement such measures.

(g) A permittee shall be considered to be in compliance with the immediate notification requirements of this section if the permittee notifies the department as soon as possible but not later than 24 hours after the permittee discovers or, in the exercise of due care, should have discovered the event for which immediate notification is required.

§70.12. Facility Requirements.

(a) A permittee must allow department staff access to all facilities covered by the permit.

(b) Toxic and/or genetically modified aquatic plants may be possessed only in a controlled facility and in compliance with all safeguards in place as specified by the department, and/or by other applicable law.

(c) A facility must be designed and constructed to prevent the discharge of exotic aquatic plants or toxins from the exotic aquatic plants, including discharges into the water in the state or any water or wastewater stream.

(d) The department may require a permittee to implement additional types of containment measures to address all methods by which an exotic aquatic plant could be discharged, including, but limited to containment measures to prevent the discharge of exotic aquatic plant species via airborne propagules or wildlife vectors.

(e) All facilities located within the 100-year flood plain (referred to as Zone A on the National Flood Insurance Program Flood Insurance Rate Map) must comply with the following, as applicable:

(1) if the facility is not a controlled facility, the facility must be enclosed within an earthen or concrete dike or levee constructed in such a manner as to exclude all flood waters such that no section of the crest of the dike or levee is less than one foot above the 100-year flood elevation and dike or levee design or construction must be approved by the department before issuance of a permit; or

(2) if the facility is a controlled facility, the permittee must submit a plan for securing exotic aquatic plants in the event of a natural or man-made disaster such as a flood, hurricane, or fire.

(f) All discharges of wastewater from a permitted facility shall be routed through devices designed to prevent discharges of exotic aquatic plants as identified in the permit provisions for the facility.

(g) All devices to prevent discharge required by this subchapter or the provisions of a permit must be in place and properly maintained and operated at all times that permitted exotic aquatic plants are possessed at the facility.

(h) The department may approve or specify, as part of the permit provisions, alternate methods of preventing the discharge of harmful or potentially harmful exotic aquatic plants or their propagules upon a finding that those methods are effective in preventing the discharge of exotic aquatic plants or their propagules from the permitted facility.

§70.13. Labeling, Packaging, and Transport.

(a) Applicability. This section applies to an exotic aquatic plant that is not on the approved list and is possessed pursuant to a permit.

(b) Transport. Except as otherwise provided in this subchapter or a provision of the applicable permit, no person may transport an exotic aquatic plant into or within this state or otherwise remove an exotic aquatic plant from a permitted facility unless:

(1) the exotic aquatic plant is being transported directly to a person and/or facility that is authorized by permit issued under this subchapter to possess the exotic aquatic plant being transported or is being transported for delivery outside this state;

(2) the exotic aquatic plant is packaged in accordance with this section; and

(3) the exotic aquatic plant is accompanied by a transport invoice that complies with this section during the entire period of time in which the exotic aquatic plant is in transport.

(c) Transport Invoice. A transport invoice required by this section shall contain the following information, legibly written, in English:

(1) a unique invoice number (invoice numbers shall be sequential);

(2) date of shipment;

(3) name, address and phone number of shipper;

(4) name, address and phone number of receiver;

(5) the permit number of the shipper and receiver;

(6) if applicable, the aquaculture license number of the shipper and receiver;

(7) the number of packages or containers in the shipment; and

(8) the common name, if known, and identification to the taxonomic level of each species listed in the permit.

(d) Packaging. Exotic aquatic plants being transported within this state shall be packaged in a container as follows:

(1) each container shall be a closed or sealed container having a volume no greater than that specified in the permit, or as otherwise authorized in writing by the department;

(2) except as specifically authorized in an applicable permit, each container shall contain no more than one species of exotic aquatic plant; and

(3) each container of exotic aquatic plants shall be identified by a label placed on the outside of the package that is clearly visible and bears the following, in English:

(A) the legend "Exotic Aquatic Plant;" and

(B) the common name, if known, and the taxon of the plant in the container.

(e) Additional Requirements for Toxic Species. Each package or container of the exotic aquatic plant shall have attached in a conspicuous place a label with the following words in at least 36 point bold font: "Toxic Species-Harmful to Persons, Animals, or the Environment."

(f) Common Carriers. A common carrier is not required to obtain an exotic aquatic plant permit to transport an exotic aquatic plant so long as a transport invoice complying with this section accompanies the exotic aquatic plant for the entire period in which the exotic aquatic plant is in the possession of the common carrier.

(g) Interstate Shipments. An exotic aquatic plant may be transported without a permit or transport invoice and without compliance with the packaging and labeling requirements of this section if the exotic aquatic plant is being transported:

(1) from a point of origin outside this state to a destination outside this state, provided the exotic aquatic plant is not unloaded anywhere in this state; and

(2) the exotic aquatic plant is enclosed during transport in such a fashion as to prevent escape.

(h) Alternative Means. In response to a written request, the director, or designee, may issue a written notice authorizing alternative means of transport, packaging and labeling of an exotic aquatic plant if the director finds that:

(1) such alternative means are as or more effective in preventing the discharge of the exotic aquatic plant or its propagules as provided in this section; and

(2) such alternative means will not significantly increase the department's enforcement burden.

§70.14. Notification, Reporting, and Recordkeeping.

In addition to notification, reporting, and recordkeeping requirements contained elsewhere in this subchapter, a permittee shall comply with the following requirements:

(1) All reports, notices, or other documents required to be submitted to the department by a permittee shall be submitted:

(A) to the department employee(s) identified in the permit conditions; and

(B) by the method specified in the permit conditions.

(2) All records and documents required to be maintained by this subchapter shall promptly be provided upon request during normal business hours to any peace officer or department employee either acting within the scope of official duties or at the direction of the director or his or her designee.

(3) Each permittee shall submit an annual report that accounts for importation, possession, transport, sale, transfer, or other disposition of any exotic aquatic plant handled by the permittee during the reporting period. This report shall be submitted on forms provided by the department and must be received by the department by January 10 of the year following the reporting period.

(4) As a condition of the permit, the department may impose additional reporting and/or recordkeeping requirements.

(5) A permittee who ships or receives any exotic aquatic plant species shall retain a copy of each transport invoice for a period of two years from the date of delivery of the shipment.

§70.15. Approved Exotic Aquatic Plants.

The following species of exotic aquatic plant species are approved for possession.
Figure: 31 TAC §70.15

§70.16. Amendment of the List of Approved Species.

(a) A person seeking to recommend that the department add an exotic aquatic plant species to the approved list must submit to the department a completed application, on a form provided or approved by the department, to add a species to the approved list. At a minimum, the application shall include a risk assessment completed on a form approved or supplied by the department.

(b) If the department concludes that an exotic aquatic plant species should be added to the approved list, department staff shall recommend to the Commission that this subchapter be amended to add the species to the approved list. Any amendment of this subchapter will be pursuant to the rulemaking procedures specified in Government Code, Chapter 2001 (the Administrative Procedure Act).

(c) If department staff concludes that an exotic aquatic plant species should not be added to the approved list, the department will notify the applicant.

(d) The department must deny an application to add an exotic aquatic plant species to the approved list if:

(1) the available information supports a finding that the exotic aquatic plant species will cause or has the potential to cause environmental, economic, or health problems;

(2) the applicant fails to provide sufficient information; or

(3) sufficient information is not available about the exotic aquatic plant species to enable department staff to make a determination that the species will not cause or threaten to cause environmental, economic, or health problems.

(e) The department will not consider an application to add an exotic aquatic plant species to the approved list if the species is on the ineligible species list, unless new information is provided justifying a revised risk assessment of the aquatic plant.

(f) The department will recommend to the commission that it remove an exotic aquatic plant species from the approved list if the department determines, based on information submitted to the department or otherwise available to the department, that the previous decision to include the species on the approved list was made in error or that information currently available indicates that the species threatens to cause environmental, economic, or health problems. Provided, however, nothing in this subsection shall be construed to limit the department's authority to enact emergency rules pursuant to Government Code, Chapter 2001 (the Administrative Procedure Act), or Parks and Wildlife Code, §12.027 or §66.007.

§70.17. Prohibited Acts.

(a) It is an offense to violate any provision of this subchapter or any condition of a permit issued under this subchapter.

(b) It is an offense to possess any species of exotic aquatic plant or its propagules in this state, unless:

(1) the species is listed in §70.15 of this title (relating to Approved Exotic Aquatic Plants);

(2) the possession is specifically authorized under the conditions of a permit issued under this subchapter; or

(3) the possession is authorized under a provision of this subchapter.

§70.18. Temporary Transition Provisions.

(a) A person who submits an application to add an exotic aquatic plant species to the approved list on or before July 31, 2011, may continue to possess and sell the species covered in the application until such time as the department makes a determination to either add the species to the approved list or reject the application, so long as the species is not on the ineligible species list.

(b) A person who submits an application for a permit under this subchapter on or before July 31, 2011, may continue to possess an exotic aquatic plant species for which the permit is being sought without a permit until the department makes a determination to either issue or deny a permit so long as the species is not on the ineligible species list.

(c) A person who on April 30, 2011, has a department-issued permit to possess an exotic aquatic plant species that is on the ineligible species list may continue to engage in activities authorized by the permit so long as the person submits an application for a permit under this subchapter on or before July 31, 2011 and continues to comply with the conditions of the permit.

(d) An applicant or permittee who possesses an exotic aquatic plant species pursuant to this section shall, in a manner approved in writing by the department, dispose of the species within the timeframes required by the department, and in accordance with all provisions of §70.10 of this title (relating to Discontinuation of Permitted Activities), if the department denies an application for a permit under this subchapter.

(e) This section, with the exception of subsection (d) of this section, expires on May 1, 2012.

§70.19. Violations and Penalties.

The penalties for a violation of this subchapter are prescribed by the Parks and Wildlife Code, including, but not limited to Chapter 66.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007041
Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER B. EXOTIC MICROALGAE

31 TAC §§70.51 - 70.67

The Texas Parks and Wildlife Department (the department) proposes new §§70.51 - 70.67, concerning Exotic Microalgae. The proposed new rules would constitute a new subchapter (Subchapter B) within a new chapter (Chapter 70) devoted specifically to regulations governing exotic microalgae. Although this rulemaking proposes new rules governing exotic microalgae, all department regulations governing aquatic plants eventually will be relocated to new Chapter 70.

Background

As part of the review of the department pursuant to Texas Government Code, Chapter 325 (the Texas Sunset Act), the Texas Sunset Advisory Commission issued a report that recommended, among other things, that the department be required "to create a list of aquatic plants that may be imported and possessed within Texas without a permit." See, Sunset Advisory Commission Final Report, Texas Parks and Wildlife Department, July 2009, p. 5. In 2009, the 81st Texas Legislature enacted House Bill 3391 (HB 3391), often referred to as the department's sunset bill, amended Texas Parks and Wildlife Code, §66.007 to require the department to adopt by rule a list of exotic aquatic plants "that are approved for importation into or possession in this state without a permit" issued by the department. Texas Parks and Wildlife Code §66.007(b)(2). This legislation required that the department "strive to ensure that the rules are as permissive as possible without allowing the importation or possession of plants that pose environmental, economic, or health problems." Texas Parks and Wildlife Code §66.007(b). This statute goes on to state that a "person may not import into or possess in this state an exotic aquatic plant unless: (1) the plant is on the approved list; or (2) the person has an exotic species permit issued by the department." Texas Parks and Wildlife Code §66.007(m). The approved list is required to include "an exotic aquatic plant that "(1) is widespread in this

state; and, (2) is not, as determined by the department, a cause of environmental, economic, or health problems." Texas Parks and Wildlife Code §66.007(o). The department is also required to develop a process to evaluate the potential harm that may be caused by the importation or possession of an exotic aquatic plant and to develop a process for adding exotic aquatic plants to the list of plants approved for import or possession. Texas Parks and Wildlife Code §66.007(n) and (p).

Exotic aquatic plant species are an increasing problem in Texas. Aquatic plants that are not native to Texas may compete with native plants and damage habitat for fish and other aquatic species. Because introduced species often lack natural enemies in their new environment, they can multiply and spread at an alarming rate, interfering with boat traffic, affecting water quality, and out-competing native plants. Some exotic aquatic plants grow, reproduce, and spread with great speed and vigor, readily establishing over large areas, and are often resistant to eradication and/or removal efforts. As exotic aquatic plant species spread and dominate ecosystems, they decrease biodiversity by destroying habitat that native plants and animals depend upon for survival. In addition to negatively impacting ecosystems, exotic aquatic species also cause economic damage. It is very expensive to prevent, monitor and control the spread of exotic aquatic plants, not to mention the damage to fisheries, forests, and other resources, such as recreational environments.

Current department rules in Chapter 57, Subchapter A, regulate harmful or potentially harmful fish, shellfish, and aquatic plants. Section 57.119 of those rules contains a list of exotic aquatic plant species that may not be possessed in Texas. Under the current regulatory approach, an exotic aquatic plant may be possessed in Texas, unless it is on the list of prohibited plants (the prohibited list), although some plants on the prohibited list may be possessed with a department-issued exotic species permit.

The new regulatory approach prohibits the intentional possession of exotic aquatic plants, including microalgae, in Texas unless the plant is on the approved list of exotic aquatic plants, or person possessing the plant has obtained a permit issued by the department or the person is otherwise authorized by the proposed regulations to possess exotic aquatic plants, including microalgae.

The proposed regulations implementing the HB 3391 are divided into two subchapters. Proposed Subchapter A of Chapter 70, published elsewhere in this issue of the *Texas Register,* contains regulations regarding exotic aquatic vascular plants and macroalgae. Subchapter B of Chapter 70, proposed in this rulemaking concerns exotic microalgae. Although microalgae, macroalgae, and vascular plants are all considered plants pursuant to the Integrated Taxonomic Information System (ITIS; http://www.itis.gov/), there are sufficient differences between the cultivation and uses of microalgae and the cultivation and uses of vascular plants and macroalgae, that separate subchapters are warranted for purposes of regulatory clarity.

Applicability

Proposed new §70.51, concerning Applicability, would provide for the primacy of new Chapter 70, Subchapter B, in any conflict with the provisions of Chapter 57, Subchapter A, and make it clear that nothing in the rules absolves any person of the obligation to comply with other applicable law. The provisions are necessary to prevent confusion.

In addition, proposed new §70.51 provides that the provisions of Chapter 70, Subchapter B do not apply to the possession of exotic aquatic vascular plants and macroalgae. Exotic aquatic vascular plants and macroalgae are addressed in a proposed new Chapter 70, Subchapter A, published elsewhere in this issue of the *Texas Register.* As noted above, issues regarding microalgae are sufficiently different from issues regarding vascular plants and microalgae, and for purposes of clarity, they are in a separate subchapter.

Proposed new §70.51(d) would provide that the proposed new rules do not relieve any person from compliance with any applicable federal, state, or local law. The proposed new provision is necessary to ensure that the regulated community is not misled into thinking that compliance with federal, state, or local laws is not necessary. Definitions

Proposed new §70.52, concerning Definitions, would establish meanings for specific words and terms used in the proposed new rules, which is generally necessary to provide unambiguous terminology for purposes of promoting compliance and enhancing enforcement by reducing or eliminating the potential for confusion.

Proposed new §70.52(1) would establish a meaning for the term "ambient environment." The definition would define that term as "common, prevailing, and uncontrolled physical, chemical, and biological conditions in the water in the state that are normal for a given location outside of a permitted facility." Proposed new §70.54 uses this term. Therefore, the term must be defined for clarity, compliance and enforcement purposes.

Proposed new §70.52(2) would establish the meaning of "approved list" by reference to the list of species of exotic microalgae that are approved for possession without a permit. However, currently, there are no exotic microalgae species on the approved list.

Proposed new §70.52(3) would establish a meaning for "aquatic plant." The definition would designate as an aquatic plant any member of the Kingdom Plantae, as documented by the Integrated Taxonomic Information System, that is normally found in riparian or aquatic habitats. Under Texas Parks and Wildlife Code, §66.007(e), as amended by HB 3391, the term "exotic aquatic plant" is defined as "a nonindigenous aquatic plant that is not normally found in aquatic or riparian areas of this state." However, the term "plant" was not defined by §66.007. Therefore, in developing the definition of "aquatic plant" the department looked to the definition of "plant" from the Integrated Taxonomic Information System (ITIS), which was developed by a partnership of federal agencies, including National Oceanic and Atmospheric Administration, U.S. Geological Survey, Environmental Protection Agency, U.S. Department of Agriculture's Agriculture Research Service and Natural Resources Conservation Service, and the Smithsonian Institution National Museum of Natural History. This partnership was formed to satisfy these agencies' mutual needs for a uniform taxonomic reference system. The definition would further stipulate that the term also includes any part of an aquatic plant in any stage of the plant's life history, including propagules.

Proposed new §70.52(4) would establish the word "commission" as shorthand for the Texas Parks and Wildlife Commission.

Proposed new §70.52(5) would establish a meaning for the term "controlled facility." The term would be defined as "a facility in which exotic microalgae at all times under normal conditions are protected, at a minimum, by a building or vessel that effectively surrounds and encloses the exotic microalgae and includes features designed to restrict the exotic microalgae from leaving."

The proposed definition is necessary to define a term used in defining permit application requirements.

Proposed new §70.52(6) would establish the word "department" as shorthand for the Texas Parks and Wildlife Department.

Proposed new §70.52(7) would establish the word "director" as shorthand for the Executive Director of the Texas Parks and Wildlife Department.

Proposed new §70.52(8) would establish a meaning for the word "discharge," which would be defined as "to deposit, conduct, drain, emit, throw, or run; allow to seep or spread; or otherwise release or dispose of or to allow, permit, or suffer any of these acts or omissions by any means, including, but not limited to discharge as a result of flooding or overflow." This definition is based, in part, on Texas Water Code, §26.001(20), and is necessary to provide a convenient, abbreviated reference for what otherwise is a voluminous suite of actions and states with respect to exotic microalgae.

Proposed new §70.52(9) would establish a meaning for the term "exotic microalgae" as "a microalgae that is not native or naturalized." The term is defined to include "a genetically modified microalgae" as well as "a hybrid species of microalgae in which one or more parent species is not native or naturalized." The definition establishes those species of microalgae that do not occur in the water of the state as being exotic, and clarifies that genetically modified microalgae and certain hybridized microalgae are regarded as exotic microalgae for purposes of the subchapter. An organism that is not naturally occurring in Texas cannot be considered to be native or naturalized and must be regarded as exotic.

Proposed new §70.52(10) would establish a meaning for the term "facility infrastructure." The proposed definition would identify the types of physical equipment and structures that would be affected or regulated by the proposed new rules, which is necessary to ensure that permittees understand how to comply with the rules and the provisions of a permit.

Proposed new §70.52(11) would establish a meaning for the term "genetically modified microalgae." Since the definition of "exotic aquatic plant" includes those aquatic plants that are the result of genetic modification, the rules must therefore define what is meant by genetic modification. The proposed new paragraph would define "genetically modified microalgae" as "a microalgae in which the genetic material is altered in a way that does not occur naturally by mating or natural recombination."

Proposed new §70.52(12) would establish a meaning for the term "ineligible species list." The proposed new rules would require the department to maintain a list of exotic microalgae species known to be toxic; species known to cause environmental, economic, or health problems; and species that have been determined by the department to pose potential environmental, economic, or health problems.

Proposed new §70.52(13) would define the term "microalgae" as "microscopic photosynthetic aquatic plants. " The definition is necessary because the proposed new rules would regulate only those species of photosynthetic algae that are not visible without magnification. The definition is a generally accepted scientific standard.

Proposed new §70.52(14) would define the term "native or naturalized microalgae" as "any species of microalgae collected from the water in the state or the western Gulf of Mexico, and includes microalgae for which all parental stock was collected from the water in the state or the western Gulf of Mexico and have not been manipulated or genetically modified." The definition goes on to clarify that microalgae "intentionally placed in the water of the state or the western Gulf of Mexico for purposes of evading compliance with this subchapter is not native or naturalized." Since the definition of "exotic microalgae" references "native or naturalized" microalgae, the definition is necessary for establishing a distinction between microalgae that are exotic and other microalgae.

Proposed new §70.52(15) would define the term "nonviable" as "permanently incapable of spreading, propagating, or being propagated." Proposed new §70.53(b) allows the possession of nonviable organisms without a permit; therefore, it is necessary to define "nonviable."

Proposed new §70.52(16) would establish a meaning for the word "permit." The definition would clarify that the term "permit," as used in the proposed new rules, applies only to those permits issued under the authority of Chapter 70, Subchapter B. The proposed definition is necessary to eliminate confusion with respect to other permits issued by the department.

Proposed new §70.52(17) would establish a meaning for the term "permittee." The definition is necessary to prevent confusion as to whom the provisions of the proposed new rules governing the privileges and restrictions of exotic microalgae permits would apply.

Proposed new §70.52(18) would establish a meaning for the term "possess." For the sake of a convenient, abbreviated reference for what otherwise is a voluminous suite of actions and states with respect to microalgae, the department would simply define "possess" as "a status of care, custody, or control that includes but is not limited to acquiring, holding, displaying, propagating, selling, offering for sale, purchasing, transporting, importing, exporting, or placing into water in the state" so as to be able to use a single term throughout the rules.

Proposed new §70.52(19) would define the term "propagate" as "to multiply by sexual or asexual reproduction, including by natural or human causation," which is necessary to clearly identify an activity/process addressed elsewhere in the proposed rules. The definition is generally accepted within scientific communities.

Proposed new §70.52(20) would define the word "propagule." The word "propagule" has a specific scientific meaning, which is "any biological structure capable of propagating a plant."

Proposed new §70.52(21) would define the word "toxic" as "containing or producing poisonous material at a level or concentration capable of causing death or bodily injury to humans or causing death or debilitation to animals or plants." The proposed new rules contain provisions regarding exotic microalgae with toxic qualities; thus, it is necessary to create a clear understanding of what is meant by the word "toxic" in order to facilitate clarity, compliance and enforcement.

Proposed new §70.52(22) defines the term "water in the state." The proposed new rules contain provisions regarding "water in the state." Therefore, the proposed definition merely refers to the statutory definition in Texas Water Code, §26.001(5). Referencing the Texas Water Code is intended to avoid differential standards and confusing conflicts between regulatory definitions.

Proposed new §70.52(23) defines the term "western Gulf of Mexico." The proposed definition of "native or naturalized" includes the phrase "western Gulf of Mexico" as a geographical delim-

iter for determining whether microalgae is classified as an exotic for the purposes of the proposed new rules. The proposed definition would establish a distinct geographical area to which the term applies.

General Provisions

Proposed new §70.53, concerning General Provisions, would establish provisions of general applicability.

Proposed new §70.53(a) would specify the circumstances under which an exotic microalgae permit is required. Under the provisions of Texas Parks and Wildlife Code, §66.007(m), no person may import into or possess in this state an exotic aquatic plant, which would include microalgae, that is not on the approved list unless the plant is on the approved list or the person has a permit issued by the department.

Proposed new §70.53(b) would set forth by rule the circumstances under which an exotic microalgae permit is not required. Proposed new §70.53(b)(1)(A) would stipulate that no permit is required to possess or import native or naturalized species. Naturalized species are non-natives that have become established but do not pose a threat to native communities or ecosystems. The department therefore reasons that a permit should not be required for their possession. Proposed §70.53(b)(1) would state that no permit is required to possess any microalgae that is native or naturalized. Proposed §70.53(b)(2) would state that no permit is required to possess any exotic microalgae that is nonviable. An exotic microalgae that is incapable of sustaining living biological processes is not normally a threat to native ecosystems; thus, there is no need for the department to regulate the possession of such plants. Proposed §70.53(b)(3) - (5) would create a permit exception for microalgae on or in humans or animals in Texas; on or in processed foods, beverages, or pharmaceuticals; and contained in ship-borne ballast water in the Gulf of Mexico. The proposed regulations are intended to apply to those persons who intentionally possess microalgae, not those who possess microalgae unknowingly and without intent to evade legal compliance. Proposed §70.53(b)(6) would create a permit exception for reference collections, herbaria, and educational use. The proposed new subparagraph would stipulate that microalgae be kept in a controlled facility; not transferred to anyone else unless that person is authorized or permitted to possess it; not used in an activity for which a permit is required; and not discharged. The person maintaining the microalgae would also have to establish a written emergency plan. Proposed §70.53(b)(7) would exclude microalgae that are on the approved list contained at §70.64, concerning Approved Exotic Microalgae from the permitting requirements of the proposed new rules.

Proposed new §70.53(c) would establish the department's policy with regard to taxonomic identification of microalgae for purposes of determining whether the proposed new rules apply to any given microalgae. Proposed new §70.53(c) would provide that reclassification of a species, a change in nomenclature, or the use of synonyms for a particular plant or group of plants would not in and of itself change the regulatory status of a plant. The proposed new subsection is necessary to make clear that a taxonomic name or classification change does not affect the status of an organism with respect to the applicability of the proposed new rules.

Proposed new §70.53(d) would require the department to maintain a list of ineligible species. Such a list will ensure that the regulated community is kept aware of those species that the department has evaluated and found to be a risk for causing environmental, economic, or health problems.

Permit Application

Proposed new §70.54, concerning Permit Application, would set forth the specific requirements that prospective permittees would be required to meet as part of the application process for an exotic microalgae permit under the proposed new subchapter. Proposed §70.54 is structured to ensure that permit applicants have adequately researched the potential impacts of the activities for which a permit is sought and have established appropriate safeguards.

Proposed new §70.54(a) and (b) would require an applicant to submit a complete application on a form supplied or approved by the department and stipulate that the department will not issue a permit unless and until all information required by the rules has been furnished. Proposed new subsection (b) provides that an administratively complete application would consist of a description of all activities the applicant seeks to conduct, including identification of exotic microalgae for which the applicant seeks a permit at a level no higher than genus; a description of where and how the exotic microalgae will be contained and control measures in place to prevent discharge of the exotic microalgae; the required fee; any additional information reasonably requested by the department; an affidavit signed by the applicant attesting that the applicant has conducted due diligence regarding the exotic microalgae to be used and that to the applicant's knowledge the exotic microalgae do not and will not cause environmental, economic, or health problems or pose a threat to do so; evidence that the applicant either possesses the appropriate valid wastewater discharge authorization or exemption from the Texas Commission on Environmental Quality or documentation demonstrating that the facility is designed and will be operated at all times in a manner such that no discharge into or adjacent to water in the state will, or is likely to occur; the name, physical address, and telephone number of the owner of the property or properties where activities will take place; a written emergency plan describing the course of action to prevent and respond to an unauthorized discharge; and documentation demonstrating that the facility complies with the provisions of proposed new §70.61, regarding Facility Requirements.

Proposed new §70.54(c) would set forth the application requirements for persons seeking a permit that would authorize possession of genetically modified microalgae or microalgae on the ineligible microalgae list, in an environment other than a controlled facility, in addition to the requirements of proposed new subsection (b). An applicant seeking to possess genetically modified microalgae outside of a controlled facility would be required to furnish an affidavit attesting that the applicant or permittee is in compliance with the provisions of proposed new §70.54(d) and (e).

Proposed new §70.54(d)(1) requires that the applicant or permittee possesses bona fide research results which consider certain characteristics for each genetically modified microalgae which the applicant or permittee seeks to possess in other than a controlled facility. The characteristics about which research results are required are: resource competition; reproductive competition; novel gene introduction to wild population(s); detectable impacts on the structure and function of aquatic food webs; and introduction of toxins or other harmful biological agents.

Proposed new §70.54(d)(2) requires that any genetically modified microalgae or microalgae that is on the ineligible microalgae

list possessed in an environment other than a controlled facility, either contain a genetic modification that effectively sterilizes or cripples a metabolic pathway or causes programmed cell death to prevent survival in the ambient environment, or is incapable of survival in the ambient environment.

Proposed new §70.54(e) requires that research results required by subsection (d) include, for each genetically modified microalgae or microalgae that is on the ineligible microalgae list for which a permit is sought, accurate information regarding viability (survival and cell division); longevity (length of life cycle); range of tolerance to environmental conditions (e.g., temperature, salinity, desiccation); production of resting cells or spores; means of distribution (water exchange, aerial, biological); and means of reproduction (asexual and/or sexual).

Proposed new §70.54(f) requires that the research required by subsections (d) and (e) be maintained by the permittee for the duration of the permit's period of validity.

Proposed new §70.54(g) requires that prior to the issuance of a permit, the applicant or permittee must make the research described in subsections (d) and (e) available for inspection at the applicant's or permittee's business location during normal business hours by any peace officer or department employee acting within the scope of official duties.

Permit Issuance, Renewal, and Amendment.

Proposed new §70.55, concerning Permit Issuance, Renewal, or Amendment, would set forth the standards the department will follow regarding the issuance, renewal, or amendment of permits issued under the proposed new subchapter.

Proposed new §70.55(a) would require permits to be issued to named individuals, but would allow entities such as corporations, governmental subdivisions or agencies, trusts, partnerships, and associations to be named as co-permittees, and would stipulate that all persons and entities named on a permit would be responsible for compliance with the provisions of a permit and the proposed new subchapter.

Proposed new §70.55(b) would prescribe the conditions under which the department would consider issuing or renewing a permit under the proposed new subchapter. To be considered for permit issuance or renewal, an applicant would be required to have met all of the application requirements of the subchapter for issuance, renewal, or amendment of a permit, and be in compliance with all applicable provisions of the subchapter and, if the application is for renewal or amendment, the conditions of the previous or current permit.

Proposed new §70.55(c) would provide that the department will issue or deny an exotic microalgae permit or renewal within 90 calendar days after receiving an administratively completed permit application and that if the department is unable to issue or deny issuance of an exotic microalgae permit or renewal within the 90-day period provided in this subsection, the department may extend the period for issuing or denying an exotic microalgae permit or renewal by an additional 30 calendar days by informing the applicant in writing of the reason for the delay.

Proposed new §70.55(d) would provide that if the department does not act to issue or deny a permit renewal or amendment within the time periods specified in subsection (c), the permit renewal or amendment would be considered renewed or amended.

Proposed new §70.55(e) would provide that the department may direct that a facility inspection be conducted prior to the issuance, renewal, or amendment of a permit in order to determine that the facility is in compliance with the subchapter.

Proposed new §70.55(f) would set forth the conditions for provisional approval of a facility. The proposed new subsection would provide that the department may issue a letter to a potential applicant provisionally approving a facility, provided the applicant has met all requirements for permit application and issuance and has demonstrated to the department's satisfaction that facility will meet all applicable facility requirements set forth in the rules.

Proposed new §70.55(g) would provide that the department may deny a permit for an applicant to whom a letter of provisional approval has been issued, if applicant fails to construct the facility within two years of receiving a letter of provisional approval, the facility as built is significantly different from the planned facility, or the information provided in the permit application materially changes after issuance of the provisional approval letter.

Proposed new §70.55(h) would require a permittee to submit an application for a permit amendment prior to making any material changes in the conditions, facilities or activities addressed in the permit and would prohibit a permittee from implementing any such material changes until a permit amendment has been authorized by the department. The application for a permit amendment would be required to include, at a minimum, an accurate narrative description of all planned material changes in the conditions, facilities or activities addressed in the permit and modified documents required to be submitted for the initial permit modified to clearly reflect any material changes in the conditions, facilities or activities to be changed under the permit amendment.

Permit Privileges, Restrictions, and Term

Proposed new §70.56, concerning Permit Privileges and Restrictions, would provide that a permit issued under the proposed new subchapter authorizes specific activities involving specified exotic microalgae at the times and places as set forth in the permit provisions; prescribes a 10-year maximum period of validity for a permit, with annual renewal; and provides that permits are not transferable.

Denial of Issuance or Renewal

Proposed new §70.57, concerning Denial of Issuance or Renewal, would address the conditions under which the department may refuse or withhold issuance or renewal of an exotic microalgae permit.

Proposed new §70.57(a)(1) provides that the department may refuse permit issuance or renewal to an applicant who has not met the requirements for a permit under the proposed new subchapter or other law.

Proposed new §70.57(a)(2) provides that the department may refuse permit issuance or renewal when the applicant has provided insufficient information to determine whether the species the applicant seeks to posses will cause environmental, economic, or health problems.

Proposed new §70.57(a)(3) provides that the department may refuse permit issuance or renewal to a person who has not abided by the conditions of a previous permit.

Proposed new §70.57(a)(4) provides that the department may refuse permit issuance or renewal to a person who is delinquent in paying a debt to the department.

Proposed new §70.57(a)(5) provides that the department may refuse permit issuance or renewal to a person who is ineligible to hold a permit due to child-support enforcement actions. Under the provisions of Texas Family Code, Chapter 232, the Attorney General is authorized to prevent the issuance of permits to any person who is delinquent in the discharge of court-ordered child-support obligations.

Proposed new §70.57(a)(6) provides that the department may refuse permit issuance or renewal to a person who has made false statements or material misrepresentations on an application for a permit.

Proposed new §70.57(a)(7) and (8) provide that the department may refuse permit issuance or renewal to a person who does not provide information requested by the department, including information on the applicant's criminal history.

Proposed new §70.57(a)(9) provides that the department may refuse permit issuance or renewal to a person who has been convicted, pleaded nolo contendere, received deferred adjudication or pretrial diversion or a civil penalty, if applicable, for a violation of the proposed new chapter; Chapter 57, Subchapter A or C; a violation of Texas Parks and Wildlife Code that is a Class A or B misdemeanor, or a felony; or the federal Lacey Act. The purpose of the proposed new provisions is to provide that the department may deny permit issuance or renewal to persons who have been proven to exhibit disregard for major statutes and regulations governing the conservation of fish and wildlife, including the possession of aquatic species, from obtaining permits.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law enacted in 1900 that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported or sold in violation of state law. Lacey Act prosecutions are normally conducted by the U.S. Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is predicated on a violation of state law, the federal government need only prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction.

The denial of issuance or renewal of an exotic microalgae permit under proposed §70.57 would not be automatic, but would be within the discretion of the department. Factors that may be considered by the department in determining whether to issue or renew a permit based on a conviction or civil penalty would include, but not be limited to, the seriousness of the offence, the number of offenses, the existence or absences of a pattern of offenses, the length of time between the offense and the permit application, the applicant's efforts towards rehabilitation, and the accuracy of the information provided by the applicant regarding the applicant's prior permit history.

Proposed new §70.57(b) provides that the department may withhold the processing of a permit or renewal application if the applicant is a defendant in a criminal prosecution or proceeding to assess a civil penalty, if applicable, for any of the violations listed in proposed new §70.57(a)(9). The proposed new subsection is necessary for the same reasons articulated in the discussion of proposed new §70.57(a)(9).

Proposed new §70.57(c) provides that the department may refuse permit issuance or renewal to any person who the department has evidence is acting on behalf or as a surrogate for a person who is prohibited from obtaining a permit under the provisions of the proposed new subchapter.

Review of Agency Decision

Proposed new §70.58, concerning Review of Agency Decision, would provide a mechanism for persons who have been denied permit issuance or renewal to have the opportunity have such decisions reviewed by department managers. The proposed new section is intended to help ensure that decisions affecting permit privileges are the result of sound reasoning.

Discontinuation of Permitted Activities

Proposed new §70.59 concerning Discontinuation of Permitted Activities, would set forth the obligations of a permittee in the event that the permittee permanently ceases operations under a permit or seeks an amendment to the existing permit.

Proposed new §70.59(a) and (b) would require permittees to notify the department at least 14 days prior to the cessation of permitted activities and immediately and lawfully sell, transfer, or destroy, in accordance with a department-approved plan, all exotic microalgae for which a permit is required. The proposed new provision is necessary to ensure that the department is timely informed that a permittee has ceased operations and that all stock held under a permit is safely and lawfully disposed of. Proposed new §70.59(b) also would allow the department to order the cessation of permitted activities and the removal of all exotic microalgae for which a permit is required or take other appropriate action upon determining that activities cause or are threatening to cause environmental, economic, or health problems, or upon an action by a federal or state agency results in the suspension or revocation of a clearance, permit, or authorization that is required under the provisions of the proposed new subchapter. The proposed new provision is necessary to prevent exotic microalgae from creating an environmental, economic, or health problem.

Proposed new §70.59(c) would require a permittee to comply with instructions of the department issued pursuant to subsection (b) regarding the handling of exotic microalgae species.

Escape, Overflow, Toxicity or Emergency

Proposed new §70.60, concerning Escape, Overflow, Toxicity or Emergency, would prescribe the requirements for response in the event that exotic microalgae escapes or is discharged from a facility, or toxic properties or conditions are discovered within a facility, or other emergencies. The purpose of this section is to ensure that in the event of a potential environmental, economic or health problem, permittees take quick, responsible, and appropriate action and that the department is provided with the information and resources necessary to respond to such a problem.

Proposed new §70.60(a) would stipulate that a permittee is responsible for all costs associated with the detection, control, and eradication of exotic microalgae that are released or escape in an unauthorized manner from a facility permitted under the proposed new subchapter. The proposed new provision is necessary to ensure that permittees are aware of the potential financial liability for remediating an escapement from a facility.

Proposed new §70.60(b) would require a permittee to immediately notify the department upon discovering any previously unknown harmful or toxic properties associated with an exotic aquatic species held under a permit. Such reporting requirements will enable the department to intervene to prevent environmental, economic, or health problems that could arise from the discovery of toxic properties associated with an exotic microalgae held under a permit.

Proposed new §70.60(c) provides that department may amend a permit to impose additional conditions or revoke a permit if toxic properties or environmental, economic, or health problems associated with an exotic microalgae are discovered during the course of conducting activities under a permit.

Proposed new §70.60(d) would require a permittee to immediately notify the department and begin implementation of a department-approved emergency plan in the event that a facility appears to be in imminent danger of overflowing, flooding, or discharging exotic microalgae into the water in the state.

Proposed new §70.60(e) would require a permittee to immediately halt all discharges from a facility and notify the department upon discovery of an unauthorized discharge from a facility.

Proposed new §70.60(f) provides that the department may prescribe recovery, containment, and/or eradication measures to be employed by the permittee as a consequence of being notified of an unauthorized discharge. Such measures are intended to reduce the potential for exotic aquatic species to create environmental, economic, or health problems.

Proposed new §70.60(g) establishes that a permittee will be considered to be in compliance with the notification requirements if the notification to the department occurs as soon as possible, but no later than 24 hours after the permittee discovers an unauthorized discharge or in the exercise of due care should have discovered an unauthorized discharge for which notification of the department is required. Facility Requirements

Proposed new §70.61, concerning Facility Requirements, would set forth the requirements for the physical infrastructure at facilities where exotic microalgae are possessed for specific activities pursuant to a permit.

Proposed new §70.61(a) would require a permittee to allow access by the department to a facility at all times that the facility is in operation. The proposed provision is necessary to enable that the department to determine that the facility is in compliance with the proposed new subchapter.

Proposed new §70.61(b) would require a facility to be designed so as to prevent the discharge of exotic microalgae into the water in the state or any water or wastewater stream. The requirement is necessary to prevent environmental, economic, or health problems resulting from the discharge or escape of exotic microalgae possessed by a permittee.

Proposed new §70.61(c) would require a facility to be designed, constructed, and maintained in way to ensure the destruction of exotic microalgae or propagules prior to discharge into the water in the state, a treatment facility, or as solid waste.

Proposed new §70.61(d)(1) would require that a facility that is not a controlled facility and is located within the 100-year flood plain to be enclosed within an earthen or concrete dike or levee constructed in such a manner that no section of the crest of the structure is less than one foot above the 100-year flood plain elevation. Proposed new §70.61(d)(2) would require that if controlled facility is located within the 100-year flood plain, the permittee must submit a plan for securing the exotic microalgae in the event of a natural or man-made disaster. The purpose of the proposed new section is to ensure facility requirements minimize or eliminate the risk of escape or release of exotic microalgae held under a permit. One dimension of risk is the susceptibility of a facility to inundation during flood events.

Proposed new §70.61(e) and (f) would require permittees to employ, operate, and maintain all required devices at all times that exotic microalgae are possessed within a facility.

Proposed new §70.61(g) would allow the department to approve alternate methods of preventing the discharge of harmful or potentially harmful exotic microalgae or their propagules upon a finding that those methods are as or more effective in preventing the discharge of exotic microalgae or their propagules from the permitted facility. Because of the wide variety and extraordinary diversity of exotic microalgae, the scenarios for their propagation, and the evolving scientific understanding, it is prudent and appropriate to provide a mechanism for considering alternative methods for preventing the discharge of harmful or potentially harmful exotic microalgae, provided the comparative efficacy of those methods is proven to the department's satisfaction.

Labeling, Packaging and Transport

Proposed new §70.62, concerning Labeling, Packaging and Transport, would set forth requirements for the identification of exotic microalgae possessed under a permit and requirements for the transport of exotic microalgae from or to a facility.

Proposed new §70.62(a) would restrict the applicability of the section to exotic microalgae that are possessed under a permit. The proposed new provision is necessary to clearly identify the exotic microalgae to which the proposed new sections apply.

Proposed new §70.62(b) would require exotic microalgae held under a permit to be transported or removed from a facility only if the exotic microalgae is being transported to another person or facility that is permitted to possess the exotic microalgae, the exotic microalgae is packaged in accordance with the provisions of the proposed new section, and the exotic microalgae is accompanied by a transport invoice for the entire duration of the transport process. The proposed provision is intended to ensure that the department is able to determine that an exotic microalgae encountered outside of a permitted facility is lawfully possessed, and to have accurate information on-site to react appropriately in the event that an exotic microalgae is released as the consequence of an accident or intentional act while in transport.

Proposed new §70.62(c) would prescribe the contents of the transport invoice required by proposed new §70.62(a). The transport invoice would be required to be uniquely numbered; identify the date of the shipment; contain the name, address, and phone number of the shipper; the name, address, and phone number of the receiver; the exotic microalgae permit numbers of the shipper and receiver; if applicable, the aquaculture license number of the shipper and receiver; the volume of microalgae/media and identification of the exotic microalgae to the taxonomic level listed in the permit. The information required by the proposed new provision will enable the department to identify the source and destination of shipments of exotic microalgae for which a permit is required, and to identify the exotic microalgae being transported.

Proposed new §70.62(d) would set forth the packaging and labeling requirements required by proposed new §70.62(a). The proposed new provision would require that all exotic microalgae for which a permit is required be packaged and labeled in a specific manner. The proposed new provision would stipulate that each container of exotic microalgae be closed or sealed and have a volume no greater than specified in the permit or in writing by the department; that each container contain only the exotic microalgae specified in the permit; and, that each package

is to be labeled, in English, with the legend "Exotic Microalgae" and a telephone number for information/assistance.

Proposed new §70.62(e) would prescribe additional labeling and identification requirements for species that have known toxic qualities. Each package of exotic microalgae known to have toxic qualities would be required to bear the legend: "Toxic Species--Harmful to Persons, Animals, or the Environment" in 36-point, bold font. The proposed provisions are necessary to inform the public and any regulatory or commercial inspection personnel of the possible toxicity of exotic microalgae being transported or displayed.

Proposed new §70.62(f) would allow exotic microalgae to be transported without a permit by common carrier, provided the common carrier possessed a transport invoice for the entire time the exotic microalgae is in the possession of the common carrier. The proposed provision is necessary to avoid burdening businesses with no connection to regulated activities from having to obtain a permit.

Proposed new §70.62(g) would exempt persons transporting exotic microalgae from both the permit and transport invoice requirements of the proposed new section, provided the exotic microalgae are being transported from a point outside of Texas to a destination outside of Texas and are not unloaded anywhere in Texas. The proposed new provision would also require exotic microalgae to be fully enclosed at all times during transport through Texas.

Proposed new §70.62(h) would provide that the department's executive director or designee may approve alternative means of transporting, labeling, or packaging an exotic microalgae if the alternative means are as or more effective in preventing the discharge of the exotic microalgae and the alternative means will not significantly increase the department's enforcement burden. The proposed new provision is necessary to address situations in which alternative means of transport may provide the same degree of protection without impacting enforcement.

Notification, Reporting, and Recordkeeping

Proposed new §70.63, concerning Notification, Reporting, and Recordkeeping, would establish notification, reporting, and recordkeeping requirements in addition to those contained elsewhere in the proposed new subchapter.

Proposed new §70.63(1) would require that all reports, notices, or other documents required by the proposed new subchapter be submitted to the department employee or employees designated on the permit as the department contact and by the method specified in the permit conditions. The proposed new section is necessary to ensure that required correspondence is sent in the manner specified in the permit directly to the specific employee or employees charged with administering the program.

Proposed new §70.63(2) would stipulate that all records and documents required by the proposed new subchapter are to be promptly provided at the request of a department employee or peace officer acting within the scope of official duties during normal business hours. The proposed new provision is necessary because the department must be able to review records and documents to enforce the provisions of the section, to conduct investigations when necessary, and to verify that permittees are in compliance with the provisions of the subchapter.

Proposed new §70.63(3) would require each permittee to submit an annual report accounting for the importation, possession, transport, sale, transfer, or other disposition of any exotic microalgae handled by the permittee.

Proposed new §70.63(4) would provide that the department may impose recordkeeping and reporting requirements as a permit condition in addition to those contained in the proposed new subchapter. The proposed new provision is necessary in order to provide the department with flexibility to address unique situations in which the nature of an activity or the species involved necessitates additional reporting measures.

Proposed new §70.63(5) would require a permittee who ships or receives any exotic microalgae to retain a copy of each transport invoice for a period of two years from the date of delivery of the shipment. The proposed new provision is necessary to facilitate investigations when necessary. The two-year period was selected because that is the statute of limitations for an offense under the subchapter.

Approved Exotic Microalgae

Proposed new §70.64, concerning Approved Exotic Microalgae, would set forth the exotic microalgae that may be possessed without a permit. However, currently, there are no microalgae species on the approved list.

Prohibited Acts

Proposed new §70.65, concerning Prohibited Acts, would notify persons that it is an offense to violate a provision of the proposed new subchapter or a condition of a permit issued under the proposed new subchapter, or to possess any species of exotic microalgae or its propagules unless the species is on the approved list or the person is specifically authorized to possess the species by a permit issued under authority of the proposed new subchapter.

Temporary Transition Provisions

Proposed new §70.66, concerning Temporary Transition Provisions, would create special provisions to address situations arising from implementation of the proposed new rules. If the proposed new subchapter is adopted by the Commission, the department intends for the new provisions to go into effect on May 1, 2011.

Proposed new subsection (a) would allow a person who submits an application for an exotic microalgae permit on or before July 31, 2011 to continue to possess, without a permit, the exotic microalgae for which the permit is sought, until the department makes a decision to either issue or deny the permit.

Proposed new §70.66(b) would require an applicant or permittee who possesses an exotic microalgae species pursuant to the proposed new section to dispose of any exotic microalgae in the applicant's or permittee's possession in accordance with proposed new §70.59, concerning Discontinuation of Permitted Activities, if the department denies an application for an exotic microalgae permit. The proposed new provision is necessary to provide for the safe destruction of exotic microalgae that becomes unlawful to possess.

Proposed new §70.66(c) establishes an expiration date of May 1, 2012 for subsection (a), which is necessary because the department intends to have completed the evaluation and transition process by that time. Violations and Penalties

Proposed new §70.67, concerning Violations and Penalties, would state the statutory penalties for violation of the proposed

new rules. The proposed new section is necessary to provide an easy-to-find reference for law enforcement purposes.

Gary Saul, Ph.D., Director of the department's Inland Fisheries Division, has determined that for each year of the first five years that the rules as proposed are in effect, there will not be fiscal implications for state or local government as a result of administering or enforcing the rules.

Dr. Saul has determined that for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the enhanced protection of the state's native ecosystems and the recreational and commercial economies that depend upon the ecosystem from the threat of establishment of exotic microalgae.

There will be economic costs for persons required to comply with the rule as proposed, if the person chooses to possess exotic microalgae, including genetically modified microalgae or microalgae on the ineligible list. The department estimates that for each of the first five years that the proposed new rules are in effect, the base economic cost to persons required to comply with the rules will be less than $700. The amount will be higher for persons who seek to possess genetically modified microalgae or microalgae on the ineligible microalgae list in an environment that is not a controlled facility. In such cases, the fee will be the $500 permit application fee and $500 per genetically modified microalgae that the applicant wishes to possess in an environment that is not a controlled facility. In addition, there will be $500 annual fee. The fee is proposed in a separate rulemaking published elsewhere in this issue of the *Texas Register.*

The primary economic cost will be the fee for a permit for exotic microalgae ($500) and $500 for each genetically modified microalgae that the applicant seeks to possess in an environment that is not a controlled facility. The fee is based in part on the historical cost to the department of processing permit applications and performing the facility inspections under the current exotic species permit rules, which regulate shrimp farms, the production of triploid grass carp, and the farming of water spinach. The current fee for an exotic species permit is $263; however, the department anticipates an increased staff commitment to exotic microalgae permits, primarily in the form of a lengthier and more complicated vetting process, as well as the likelihood of frequent permit amendments as species are cycled through research and development assays. The propagation of microalgae, particularly genetically modified microalgae, is an emergent technology and there is much that is not known about these organisms and how they interact with the environment and native ecosystems. Therefore, the department additional staff commitments to evaluating research data, monitoring efforts, and enforcement will be required. The proposed $500 fee represents the agency's best estimate of what the fee needs to be in order to recoup the agency's cost of administering the program. The fee of $500 per genetically modified microalgae is intended to offset the department's probable burden in studying the applicant's research data to determine that the particular microalgae does not pose environmental, economic, or health problems.

Since a permit for exotic microalgae may extend for up to ten (10) years and the department will incur ongoing regulatory costs, as specified above, a $500 annual fee is also being proposed.

The department notes that if future empirical data indicates that the fee is too high, the department will recommend reducing it to an amount appropriate to recoup costs. As well, if future empirical data indicate that the fee is insufficient to recoup administrative and enforcement expenses, it is likely that the department would adjust the fee accordingly.

There will also be an economic cost related to compiling or developing the information required on the application for a permit for exotic microalgae, which is estimated to be less than $100. The department believes that most if not all information required on an application will be information that the applicant has developed anyway as part of normal business practices and that therefore, the chief expense would be the collation of the material. With respect to the development of an emergency plan, the department believes that most, if not all, operations that will take place under an exotic microalgae will be sufficiently similar in nature to enable the department to make available a model emergency plan and provide a list of components of an emergency plan.

The economic costs of the reporting and recordkeeping requirements of the proposed new rules cannot be exactly determined; however, the department believes that they should not exceed more than $100 per year. The primary expense is the required annual report that must account for the importation, possession, transport, sale, transfer, or other disposition of any exotic microalgae handled by the permittee during the reporting period. The department has determined that since under ordinary business practices this information would be collected anyway, the expense to the permittee to collate the information and enter it on a department-supplied form should not cost more than $100 per year.

The economic costs of complying with the labeling, packaging, and transportation requirements of the proposed new rules will vary. The proposed rules require exotic microalgae to be packaged and labeled when being transported; however, because of the nature of microalgae, the proposed new rules provide that the department may custom tailor the packaging requirements as part of the provisions of the permit. In practical terms, this means that the department may work with a permittee to devise a system of packaging that allows the department to effectively determine the identity and volume of exotic species being transported. Shipments of exotic microalgae will be required to be labeled, but this could take the form of labeling individual containers or entire shipments. As with the packaging requirements, the proposed new rules will provide for alternative labeling requirements that will allow the department to impose effective labeling requirements while trying to minimize inconvenience to the regulated community. On this basis, the department estimates that the cost of complying with labeling and packaging requirements will be minimal and probably less than $100 per year.

The remaining economic costs of compliance are dependent on the size and scope of regulated activities, and are associated with required professional expertise (construction/engineering); capital costs for modifications to existing processes and procedures; lost sales and profits; and changes in market competition.

The economic cost of compliance with respect to required professional expertise and capital costs for modifications of facilities are associated with meeting the requirements related to the prevention and control of overflow or flood events. The proposed new rules would require an applicant to provide sufficient information for the department to determine the effectiveness of a facility with respect to preventing the discharge of exotic microalgae into the environment. For existing secure facilities the cost of compliance will not likely be significant. However, if an applicant's facility is an open facility and is deemed insufficient for

preventing or controlling discharges of exotic microalgae, it is possible that the applicant would be faced with construction-related expenses in order to comply with the requirements of the proposed new subchapter. The department notes that if a facility is capable of discharging water or wastewater into water in the state, it must comply with the regulations of the Texas Commission on Environmental Quality (TCEQ), which in most if not all cases will mean that the facility would have to meet many of the requirements of the proposed new rules anyway. However, it is possible that in some cases drainage systems or other infrastructure may need to be installed or improved in order for a facility to be permitted. The department estimates this cost at $2,500 per facility or less. This estimate was derived by using department construction information related to fish hatchery construction, specifically, trenching and burying of culvert, which is the typical method for draining or diverting water. The department notes that because such facilities have not been regulated by the department prior to this proposed rulemaking and may vary significantly in size, dimension, elevation, and other considerations, there may be instances in which costs for drainage installation or improvement exceeds $2,500. It should also be noted that many, if not all of these facilities would be required to address discharge pursuant to statutes and regulations administered by the TCEQ. As a result, in those instances, such costs are not necessarily required solely because of the proposed regulations.

Additionally, another requirement of the proposed new rules would stipulate that all unenclosed facilities located within the 100-year floodplain be surrounded by a dyke or levee with a crest not less than one foot above the 100 year flood plain level. The department estimates that the cost of compliance with this provision is approximately $45 per linear foot. This estimate was derived by using department data for the construction of earthen retention structures at department fish hatcheries, which serve a similar purpose. The estimate assumes an embankment 16 feet wide at the top, and 50 feet wide at the base, and 9 feet high, which the department believes is far more than would be required for compliance with the proposed new rules anywhere in the state. The estimate was calculated based on the volume of material that would have to be excavated, hauled, filled and, compacted, and assumes that suitable soils are available on-site. If material has to be excavated elsewhere and hauled to the site, the cost will be higher; however, that cost will vary based on the availability and location of suitable material.

Under the provisions of Texas Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic affect on small businesses and microbusinesses. To the department's knowledge, no entity affected by the proposed new rules is a small or microbusiness. The department is aware of a number of entities that have or are intending to become involved in the propagation of exotic microalgae for biofuel or other products. However, those entities are either larger than a small business or microbusiness or were not formed to the purpose of making a profit. Therefore, the department does not believe that an economic impact statement or regulatory flexibility analysis is required for the proposed new rules. However, in the event a small or microbusiness is impacted by the rule, the costs of compliance would be as stated in this preamble for persons required to comply with the rules as proposed. The department considered several alternatives to the rules as proposed. One alternative considered was to not regulate the possession of exotic microalgae. This alternative was rejected because exotic microalgae has the potential to cause or have caused environmental, economic, or health problems. To allow those species to be possessed without a permit would defeat the purpose of the rules and Texas Parks and Wildlife Code, §66.007. Another alternative considered was to create separate facility requirements. This alternative was rejected because the risk of environmental, economic, and health problems associated with exotic microalgae would be increased to an unacceptable level, which defeats the purpose of the proposed new rules.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Texas Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that the proposed rule is not a "major environmental rule" requiring a regulatory impact analysis under the Administrative Procedure Act, Texas Government Code, §2001.0225. These rules are specifically required by state law. Texas Parks and Wildlife Code, §66.007(c) requires the department to make rules to carry out the requirement of Texas Parks and Wildlife Code, §66.007, regarding harmful or potentially harmful fish, shellfish and aquatic plants. In addition, Texas Parks and Wildlife Code §66.007 requires the department to compile a list of exotic aquatic plants that are approved for possession in the state and requires the commission to exercise final authority over the list of approved plants. As a result, the proposed rules are not considered "major environmental rules."

Comments on the proposed rules may be submitted to Ken Kurzawski, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4591 (e-mail: ken.kurzawski@tpwd.state.tx.us).

The new rules are proposed under the authority of Texas Parks and Wildlife Code, §66.007, which requires the department to make rules to carry out the provisions of that section

The proposed new rules affect Texas Parks and Wildlife Code, Chapter 66.

§70.51. Applicability.

(a) This subchapter governs the possession of exotic microalgae in this state.

(b) Unless otherwise expressly provided herein, to the extent that any provision of this subchapter conflicts with the provisions of Chapter 57, Subchapter A of this title (relating to Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants) the provisions of this subchapter shall prevail.

(c) This subchapter is not applicable to the possession of exotic vascular plants or macroalgae. The possession of exotic vascular plants and macroalgae shall be governed by the provisions of Subchapter A of this chapter (relating to Exotic Aquatic Vascular Plants and Macroalgae).

(d) Nothing in this subchapter shall be construed to relieve any person from compliance with the requirements of any applicable federal, state, or local law.

§70.52. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Ambient environment--Common, prevailing and uncontrolled physical, chemical and biological conditions in the water in the state that are normal for a given location outside of a permitted facility.

(2) Approved list--The exotic microalgae listed in §70.64 of this title (relating to Approved Exotic Microalgae) that a person may possess in this state without a valid permit.

(3) Aquatic plant--

(A) An aquatic plant is any member of the Kingdom Plantae (as defined by the Integrated Taxonomic Information System) within the taxonomic units listed in this paragraph that is normally found in either aquatic or riparian habitats, including:

(i) Division Anthocerotophyta;

(ii) Division Bryophyta (mosses, certain hornworts);

(iii) Division Charophyta (stoneworts);

(iv) Division Chlorophyta (green algae);

(v) Division Chrysophyta (golden-brown algae);

(vi) Division Craspedophyta;

(vii) Division Cryptophycophyta;

(viii) Division Euglenophycota;

(ix) Division Haptophyta;

(x) Division Hepatophyta (liverworts);

(xi) Division Phaeophyta (brown algae);

(xii) Division Prasinophyta (green flagellates);

(xiii) Division Pyrrophycophyta (dinoflagellates);

(xiv) Division Rhodophyta (red algae);

(xv) Division Xanthophyta (yellow-green algae);

(xvi) Subkingdom Tracheobionta (vascular plants); and

(xvii) Subkingdom Chromista, Division Bacillariophyta (diatoms).

(B) The term "aquatic plant" includes any part of an aquatic plant in any stage of the plant's life history, including propagules.

(4) Commission--The Texas Parks and Wildlife Commission.

(5) Controlled facility--A facility in which exotic microalgae at all times under normal conditions are protected, at a minimum, by a building or vessel that effectively surrounds and encloses the exotic microalgae and includes features designed to restrict the exotic microalgae from leaving.

(6) Department--The Texas Parks and Wildlife Department.

(7) Director--The executive director of the department, or designee.

(8) Discharge--To deposit, conduct, drain, emit, throw, or run; allow to seep or spread; or otherwise release or dispose of or to allow, permit, or suffer any of these acts or omissions by any means, including, but not limited to discharge as a result of flooding or overflow.

(9) Exotic microalgae--A microalgae that is not native or naturalized, and includes:

(A) a genetically modified microalgae; and

(B) a hybrid species of microalgae in which one or more parent species is not native or naturalized.

(10) Facility infrastructure--All areas, structures or equipment that are used to grow, hold, store, process, package, or contain exotic microalgae, growth media, or nutrient or waste streams including, but not limited to buildings, ponds, raceways, bioreactors, vats, greenhouses, processing areas, netting, screening or other containment measures or equipment, water supply, drainage, outfalls, and stormwater management structures.

(11) Genetically modified microalgae--A microalgae in which the genetic material is altered in a way that does not occur naturally by mating or natural recombination.

(12) Ineligible microalgae list--A list of exotic microalgae species or strains, maintained by the department, that includes the following:

(A) species known to be toxic;

(B) species known to cause environmental, economic, or health problems; and

(C) species that have been determined by the department to pose potential environmental, economic, or health problems.

(13) Microalgae--Microscopic photosynthetic aquatic plants.

(14) Native or naturalized microalgae--Any species of microalgae collected from the water in the state or the western Gulf of Mexico, and includes microalgae for which all parental stock was collected from the water in the state or the western Gulf of Mexico and have not been manipulated or genetically modified. Microalgae intentionally placed in the water of the state or the western Gulf of Mexico for purposes of evading compliance with this subchapter is not native or naturalized.

(15) Nonviable--Permanently incapable of spreading, propagating, or being propagated.

(16) Permit--A permit that authorizes the possession of exotic microalgae, issued pursuant to the provisions of this subchapter, unless otherwise provided.

(17) Permittee--A person or entity to whom a permit has been issued.

(18) Possess--A status of care, custody, or control that includes, but is not limited to acquiring, holding, displaying, propagating, selling, offering for sale, purchasing, transporting, importing, exporting or placing into water in the state.

(19) Propagate--To multiply by sexual or asexual reproduction, including by natural or human causation.

(20) Propagule--Any biological structure capable of propagating an aquatic plant.

(21) Toxic--Containing or producing poisonous material at a level or concentration capable of causing death or bodily injury to humans or causing death or debilitation to animals or plants.

(22) Water in the state--Water in the state as defined in Chapter 26, §26.001(5) of the Texas Water Code.

(23) Western Gulf of Mexico--That area of the Gulf of Mexico west of a line beginning at the Mississippi River Southwest

Pass Entrance (N29°54'00.3", W89°25'54.3") then proceeding southward to the Yucatan Peninsula (approximately 16.2 miles east of Progresso, Mexico), and westward, including the Bay of Campeche, to the mainland of Mexico, Texas, and Louisiana including the areas of salt and brackish waters of bays, lagoons and tidal bayous.

§70.53. General Provisions.

(a) Permit Required. Except as otherwise provided in this subchapter, no person may intentionally or knowingly possess any species of exotic microalgae in this state without a valid permit issued by the department authorizing such possession.

(b) No Permit Required. No permit is required to acquire or possess microalgae:

(1) that are native or naturalized;

(2) that are shown to be nonviable;

(3) on or in humans or animals in Texas;

(4) on or in processed foods, beverages, or pharmaceuticals;

(5) contained in ship-borne ballast water in the Gulf of Mexico, so long as such possession is not an effort to avoid regulatory compliance under this chapter; provided however, nothing this subsection shall be construed to relieve a person of the obligations under Parks and Wildlife Code, §66.0071;

(6) as part of a reference collection or herbarium or for use in teaching or for educational purposes at an accredited educational institution, provided:

(A) all exotic microalgae are kept in a controlled facility;

(B) exotic microalgae are not transferred to any other person unless that person is authorized by this subchapter or a permit issued under this subchapter to possess the exotic microalgae;

(C) exotic microalgae are not used for any activity which requires a permit;

(D) a written emergency plan is established; and

(E) there is no discharge of viable exotic microalgae; or

(7) that is listed in §70.64 of this title (relating to Approved Exotic Microalgae).

(c) Taxonomic Criteria. Scientific reclassification or change in nomenclature of taxa at any level in taxonomic hierarchy, or the use of synonyms for microalgae or other grouping will not, in and of itself, result in a change in the regulatory status of that microalgae.

(d) Ineligible microalgae list. The department shall maintain a list of ineligible exotic microalgae. The list shall be readily available to the public, including availability on the department's internet web site.

§70.54. Permit Application.

(a) An applicant for a permit shall submit an administratively complete application on a form supplied or approved in writing by the department.

(b) The department will not process an application for a permit, and will not consider the application to be administratively complete, unless it includes, at a minimum:

(1) a description of all activities the applicant seeks to conduct, including identification of the exotic microalgae for which the applicant is seeking a permit, identified to a level no higher than genus on the hierarchy of biological classification;

(2) a description of where and how the exotic microalgae will be contained and the control measures that will be in place to prevent discharge of exotic microalgae;

(3) the fee required by Chapter 53 of this title (relating to Finance);

(4) any additional information reasonably requested by the department to evaluate the application;

(5) an affidavit, signed by the applicant, stating that the applicant has conducted due diligence regarding the exotic microalgae to be used and that to the applicant's knowledge the exotic microalgae do not and will not cause environmental, economic, or health problems or pose a threat to do so;

(6) the following information regarding discharges into water in the state:

(A) evidence that the applicant possesses the appropriate valid wastewater discharge authorization or has received an exemption from the Texas Commission on Environmental Quality; or

(B) documentation demonstrating that the facility is designed and will be operated at all times in a manner such that no discharge into or adjacent to water in the state will, or is likely to, occur;

(7) the name, physical address and telephone number of the owner of the property or properties where prospective activities will take place;

(8) an written emergency plan describing the course of action to prevent and respond to an unauthorized discharge of exotic microalgae into the water in the state; and

(9) documentation demonstrating that the facility complies with the provisions of §70.61 of this title (relating to Facility Requirements), including, but not limited to, a schematic representation of the facility that specifically includes:

(A) the location and functional identification of all facility infrastructure;

(B) all structures and points that are capable of functioning to drain the facility;

(C) all structures or equipment designed or intended to prevent escapement of exotic microalgae or their propagules from the facility; and

(D) sufficient information for the department to determine the effectiveness of facility system(s) at preventing discharge of the exotic microalgae, to include, at a minimum, a schematic or other description of how the system is to be deployed.

(c) If an applicant or permittee seeks to possess genetically modified microalgae or microalgae that is on the ineligible microalgae list in any environment other than a controlled facility, then an application for a permit will not be considered administratively complete unless it includes, in addition to the information described is subsection (b) of this section, an affidavit attesting to the applicant's or permittee's compliance with the requirements of subsections (d) and (e) of this section.

(d) If an applicant or permittee seeks to possess genetically modified microalgae or microalgae that is on the ineligible microalgae list in any environment other than a controlled facility, then, in addition to other permit requirements provided in this subchapter:

(1) the applicant or permittee shall possesses bona fide research results which consider the following characteristics of each ge-

netically modified microalgae for which a permit is sought should those microalgae be released into the ambient environment:

(A) resource competition;

(B) reproductive competition;

(C) novel gene introduction to wild population(s);

(D) detectable impacts on the structure and function of aquatic food webs; and

(E) introducing toxins or other harmful biological agents; and

(2) any genetically modified microalgae must:

(A) contain a genetic modification that effectively sterilizes or cripples a metabolic pathway or causes programmed cell death to prevent survival in the ambient environment; or

(B) be incapable of survival in the ambient environment.

(e) The research results required by subsection (d) of this section must also include, for each genetically modified microalgae or microalgae on the ineligible microalgae list for which a permit is sought, accurate information regarding:

(1) viability (survival and cell division);

(2) longevity (length of life cycle);

(3) range of tolerance to environmental conditions (e.g., temperature, salinity, desiccation);

(4) production of resting cells or spores;

(5) means of distribution (water exchange, aerial, biological); and

(6) means of reproduction (asexual and/or sexual).

(f) The research results required by subsection (d) of this section shall be maintained by the permittee for the duration of the permit's period of validity.

(g) Prior to the issuance of a new or renewed permit, the applicant or permittee shall make the research described in subsections (d) and (e) of this section available for inspection at applicant's or permittee's business location during normal business hours to any peace officer or department employee either acting within the scope of official duties.

§70.55. Permit Issuance, Renewal, or Amendment.

(a) A permit issued by the department pursuant to this subchapter shall be issued to a named individual. If the permit is being sought by an individual on behalf of an entity, including, but not limited to a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity, the entity shall be named as a co-permittee. All individuals and entities listed on the permit shall be responsible for compliance with this subchapter and the conditions of the permit.

(b) The department may issue, renew, or amend a permit upon finding that:

(1) the applicant has met all of the application requirements of this subchapter for issuance, renewal, or amendment of a permit; and

(2) the applicant has complied with all applicable provisions of this subchapter and, if the application is for renewal or amendment, the conditions of the previous or current permit.

(c) Except during the temporary transition period established under §70.66 of this title (relating to Temporary Transition Provisions), the department will issue or deny a new or renewed permit or permit amendment within 90 calendar days of receiving an administratively complete permit application. If the department is unable to issue or deny issuance of a permit within the 90-day period provided in this subsection, the department may extend the period for issuing or denying a permit by an additional 30 calendar days by informing the applicant in writing of the reason for the delay.

(d) If the department does not act to deny or issue an exotic microalgae permit renewal or amendment within the time periods specified in subsection (c) of this section, the permit will be considered renewed or amended upon the expiration of the time periods specified in subsection (c) of this section.

(e) In connection with an application to issue, renew, or amend a permit, the department may direct that a facility inspection be conducted by department personnel during the permit review period described in subsection (c) of this section to determine whether the facility is in compliance with the provisions of this subchapter.

(f) The department may issue a letter to a potential permit applicant provisionally approving a planned facility if the following conditions are met:

(1) the applicant submits a completed permit application, including all required information;

(2) the application meets all requirements for permit issuance, other than the requirement to obtain a facility inspection; and

(3) the applicant submits facility plans and specifications to the department demonstrating that the planned facility will meet all applicable facility requirements of this subchapter.

(g) If the department issues a letter to a potential permit applicant provisionally approving a planned facility, the department is not precluded from denying permit issuance if:

(1) the facility is not constructed within a reasonable period, not to exceed two years, after issuance of the letter;

(2) the facility, as constructed, materially differs from the facility as planned, and does not meet the facility requirements of this subchapter; or

(3) the information provided in and with the permit application materially changes after the issuance of the letter.

(h) A permittee must submit an application for a permit amendment prior to making any material changes in the conditions, facilities or activities addressed in the permit. A permittee shall not implement any material changes in the conditions, facilities or activities addressed in the permit until a permit amendment authorizing such changes has been approved by the department. The application for a permit amendment must include the following, at a minimum:

(1) an accurate narrative description of all planned material changes in the conditions, facilities or activities addressed in the permit; and

(2) modified documents required to be submitted for the initial permit under §70.54 of this title (relating to Permit Application) in which any material changes in the conditions, facilities or activities are clearly marked.

§70.56. Permit Privileges, Restrictions and Term.

(a) Privileges and Restrictions. A permit issued under the provisions of this subchapter:

(1) authorizes the permittee named on the permit to conduct only specific activities at the places and times identified in the provisions of the permit;

(2) is valid only for the specific exotic microalgae and activities set forth in the permit; and

(3) is not transferable.

(b) Term. An exotic microalgae permit shall be valid for a period of no more than 10 years from the date of issuance of the permit unless a shorter period is specified; provided, however, an annual fee is required for any permit that is for a term of more than one year.

§70.57. Denial of Issuance or Renewal.

(a) The department may refuse permit issuance or renewal based on the following:

(1) the application does not meet the requirements for a permit under this subchapter or other law;

(2) the applicant has failed to provide enough information or there is not enough information available to the department to make a determination that the proposed use of the exotic microalgae will not result in environmental, economic, or health problems;

(3) the applicant or permittee has failed to comply with the conditions of a previous permit issued by the department, including, but not limited to reporting requirements;

(4) the applicant is delinquent in submitting any funds owed to the department;

(5) the applicant's permit has been suspended pursuant to Family Code, Chapter 232;

(6) the applicant has made a false statement or material misrepresentation to the department in connection with applying for or renewing the permit;

(7) the applicant has refused to provide information requested by the department pursuant to this subchapter;

(8) the applicant has failed to provide all of the applicant's criminal history information in response to the department's request for information; or

(9) the applicant or permittee has been convicted, pleaded nolo contendere, received deferred adjudication or pretrial conversion, or assessed a civil penalty, if applicable, for a violation of:

(A) this chapter;

(B) Chapter 57, Subchapter A or C of this title (relating to Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants; or Mussels and Clams);

(C) Parks and Wildlife Code that is a Class A misdemeanor, a Class B misdemeanor, or felony; or

(D) 16 U.S.C. §§3371-3378 (the Lacey Act).

(b) The department may withhold the processing of a permit or renewal application if the applicant is a defendant in a criminal prosecution or proceeding to assess a civil penalty, if applicable, for a violation of:

(1) this chapter;

(2) Chapter 57, Subchapter A or C of this title;

(3) Parks and Wildlife Code that is a Class A misdemeanor, a Class B misdemeanor, or felony; or

(4) 16 U.S.C. §§3371-3378 (the Lacey Act).

(c) The department may refuse to issue a permit to any person the department has evidence is acting on behalf of or as a surrogate for another person who is prohibited by the provisions of this subchapter from engaging in permitted activities.

§70.58. Review of Agency Decision.

An applicant for a permit under this subchapter may request a review of a decision of the department to deny issuance or renewal of a permit or to withhold processing of a permit.

(1) An applicant seeking review of a decision of the department to deny issuance or renewal of a permit or to withhold processing of a permit shall request a review by notifying the department in writing within 10 working days of being notified by the department of the decision to deny or withhold the permit.

(2) The request for review shall be presented to a department review panel within 30 days after receipt of the request for review. The review panel shall consist of the following:

(A) the Deputy Executive Director for Natural Resources, or designee;

(B) the Director of the Inland Fisheries Division, or designee; and

(C) the Director of the Coastal Fisheries Division, or designee.

(3) The applicant may appear before the review panel and make arguments.

(4) The review panel's consideration of the review will be an informal process at which neither the Rules of Evidence nor the Rules of Civil Procedure will apply. The department may dictate informal procedural requirements to ensure the orderly conduct of the review.

(5) The decision of the review panel is the final department decision.

(6) The deadlines provided in this section may be extended by mutual written agreement of the applicant and the department.

§70.59. Discontinuation of Permitted Activities.

(a) If a permittee permanently ceases permitted activities, the permittee must:

(1) notify the department at least 14 days prior to the cessation of operation of permitted activities in compliance with the provisions of §70.63 of this title (relating to Notification, Reporting, and Recordkeeping); and

(2) lawfully sell, transfer, or destroy all exotic microalgae for which a permit under this subchapter is required in accordance with a plan submitted to and approved in writing by the department.

(b) The department may order the immediate cessation of permitted activities and/or the removal of all permitted exotic microalgae from a facility or take other appropriate action upon:

(1) a determination that activities under the permit are causing or threatening to cause environmental, economic, or health problems; or

(2) an action by a federal or state agency resulting in the suspension or revocation of a clearance, permit, or authorization that is required under this subchapter as a condition of permit issuance.

(c) The permittee shall comply with instructions of the department issued pursuant to this section regarding the handling of the exotic microalgae species.

§70.60. Escape, Overflow, Toxicity, or Emergency.

(a) In the event that exotic microalgae is discharged from a facility in a manner not authorized by a permit or this subchapter, the permittee, or, in the case of an illegal operation, the facility operator, is responsible for all costs associated with the detection, control, and eradication resulting from such discharge.

(b) If previously unknown toxic properties or environmental, economic, or health problems associated with a exotic microalgae possessed under a permit are discovered during the course of conducting activities under the permit, the permittee must immediately report such properties or problems to the department.

(c) The department may amend a permit to impose additional conditions or may revoke the permit if previously unknown toxic properties or environmental, economic, or health problems associated with exotic microalgae possessed under the permit are discovered during the course of conducting activities under the permit.

(d) In the event that a facility appears in imminent danger of overflowing, flooding, or discharging exotic microalgae into the water in the state, the permittee must immediately:

(1) notify the department; and

(2) begin implementation of the department-approved emergency plan.

(e) Upon discovery of a discharge from a facility in a manner not otherwise authorized by a permit or this subchapter, regardless of the cause, the permittee must immediately:

(1) halt all discharge from the facility; and

(2) notify the department of the discharge.

(f) Upon receiving notification required under this section, the department will prescribe recovery, containment, and/or eradication measures to be employed by the permittee and the permittee must implement such measures.

(g) A permittee shall be considered to be in compliance with the immediate notification requirements of this section if the permittee notifies the department as soon as possible but not later than 24 hours after the permittee discovers or, in the exercise of due care, should have discovered the event for which immediate notification is required.

§70.61. Facility Requirements.

(a) A permittee must allow department staff access to all facilities covered by the permit.

(b) A permitted facility must be designed and constructed to prevent the discharge of exotic microalgae or toxins from the exotic microalgae, including discharges into the water in the state or any water or wastewater stream.

(c) A permitted facility holding exotic microalgae shall be designed, constructed and maintained in a way to ensure the following:

(1) destruction of exotic microalgae or propagules prior to discharge into the water in the state or into a treatment facility; and

(2) destruction of exotic microalgae or propagules contained in solid waste prior to discharge of the waste.

(d) All permitted facilities located within the 100-year flood plain (referred to as Zone A on the National Flood Insurance Program Flood Insurance Rate Map) must comply with the following, as applicable:

(1) if the facility is not a controlled facility, the facility must be enclosed within an earthen or concrete dike or levee constructed in such a manner as to exclude all flood waters such that no section of the crest of the dike or levee is less than one foot above the 100-year flood elevation and dike or levee design or construction must be approved by the department before issuance of a permit; or

(2) if the facility is a controlled facility, the permittee must submit a plan for securing exotic microalgae in the event of a natural or man-made disaster such as a flood, hurricane, or fire.

(e) All discharges of wastewater from a permitted facility shall be routed through devices designed to prevent discharges of exotic microalgae as identified in the permit provisions for the facility.

(f) All devices to prevent discharge required by this subchapter or the provisions of a permit must be in place and properly maintained and operated at all times that permitted exotic microalgae are possessed at the facility.

(g) The department may approve or specify, as part of the permit provisions, alternate methods of preventing the discharge of harmful or potentially harmful exotic microalgae or their propagules upon a finding that those methods are effective in preventing the discharge of exotic microalgae or their propagules from the permitted facility.

§70.62. Labeling, Packaging, and Transport.

(a) Applicability. This section applies to an exotic microalgae that is possessed pursuant to a permit.

(b) Transport. Except as otherwise provided in this subchapter or a provision of the applicable permit, no person may transport exotic microalgae into or within this state or otherwise remove exotic microalgae from a permitted facility unless:

(1) the exotic microalgae is being transported directly to a person and/or facility that is authorized by permit issued under this subchapter to possess the exotic microalgae being transported or is being transported for delivery outside this state;

(2) the exotic microalgae is packaged in accordance with this section; and

(3) the exotic microalgae is accompanied by a transport invoice that complies with this section during the entire period of time in which the exotic microalgae is in the state.

(c) Transport Invoice. A transport invoice required by this section shall contain the following information, legibly written, in English:

(1) a unique invoice number (invoice numbers shall be sequential);

(2) date of shipment;

(3) name, address and phone number of shipper;

(4) name, address and phone number of receiver;

(5) the permit number of the shipper and receiver;

(6) if applicable, the aquaculture license number of the shipper and receiver;

(7) number of packages or containers in the shipment, if the permit requires microalgae/media to be transported in packages or containers;

(8) the volume of microalgae/media, if the permit authorizes bulk transport; and

(9) identification of the exotic microalgae to the taxonomic level listed in the permit.

(d) Packaging. If a permit requires exotic microalgae to be transported in packages or containers, the microalgae, while being

transported within this state, shall be packaged in a container as follows:

(1) each container shall be a closed or sealed container having a volume no greater than that specified in the permit, or as otherwise authorized in writing by the department;

(2) except as specifically authorized in an applicable permit, each container shall contain only the exotic microalgae authorized in the permit; and

(3) each container of exotic microalgae shall be identified by a label placed on the outside of the package that is clearly visible and bears the following, in English:

(A) the legend "Exotic Microalgae;" and

(B) a telephone number for information/assistance.

(e) Additional Requirements for Toxic Species. Each package or container of the exotic microalgae that has known toxic properties shall have attached in a conspicuous place a label with the following words in at least 36 point bold font: "Toxic Species-Harmful to Persons, Animals, or the Environment."

(f) Common Carriers. A common carrier is not required to obtain a permit to transport exotic microalgae so long as a transport invoice complying with this section accompanies the exotic microalgae for the entire period in which the exotic microalgae is in the possession of the common carrier.

(g) Interstate Shipments. Exotic microalgae may be transported without a permit or transport invoice and without compliance with the packaging and labeling requirements of this section if the exotic microalgae is being transported:

(1) from a point of origin outside this state to a destination outside this state, provided the exotic microalgae is not unloaded anywhere in this state; and

(2) the exotic microalgae is enclosed during transport in such a fashion as to prevent escape.

(h) Alternative Means. In response to a written request, the director, or designee, may issue a written notice authorizing alternative means of transport, packaging and labeling of exotic microalgae if the director finds that:

(1) such alternative means are as or more effective in preventing the discharge of the exotic microalgae or its propagules than as is provided in this section; and

(2) such alternative means will not significantly increase the department's enforcement burden.

§70.63. Notification, Reporting, and Recordkeeping.

In addition to notification, reporting, and recordkeeping requirements contained elsewhere in this subchapter, a permittee shall comply with the following requirements:

(1) All reports, notices, or other documents required to be submitted to the department by a permittee shall be submitted:

(A) to the department employee(s) identified in the permit conditions; and

(B) by the method specified in the permit conditions.

(2) All records and documents required to be maintained by this subchapter shall promptly be provided upon request during normal business hours to any peace officer or department employee either acting within the scope of official duties.

(3) Each permittee shall submit an annual report that accounts for importation, possession, transport, sale, transfer, or other disposition of any exotic microalgae handled by the permittee during the reporting period. This report shall be submitted on forms provided by the department and must be received by the department by January 10 of the year following the reporting period.

(4) As a condition of the permit, the department may impose additional reporting and/or recordkeeping requirements.

(5) A permittee who ships or receives any exotic microalgae species shall retain a copy of each transport invoice for a period of two years from the date of delivery of the shipment.

§70.64. Approved Exotic Microalgae.

The following species or strains of exotic microalgae are approved for possession without a permit: None.

§70.65. Prohibited Acts.

(a) It is an offense to violate any provision of this subchapter or any condition of a permit issued under this subchapter.

(b) It is an offense to possess any exotic microalgae or its propagules in this state, unless:

(1) the possession is specifically authorized under the conditions of a permit issued under this subchapter; or

(2) the possession is authorized under a provision of this subchapter.

§70.66. Temporary Transition Provisions.

(a) A person who submits an application for a permit issued pursuant to the provisions of this subchapter on or before July 31, 2011, may continue to possess and sell the exotic microalgae for which the permit is being sought without a permit until the department makes a determination to either issue or deny a permit.

(b) An applicant or permittee who possesses an exotic microalgae pursuant to this section shall, in a manner approved in writing by the department, dispose of the exotic microalgae within the timeframes required by the department, and in accordance with all provisions of §70.59 of this title (relating to Discontinuation of Permitted Activities), if the department denies an application for a permit issued pursuant to the provisions of this subchapter.

(c) This section, with the exception of subsection (b) of this section, expires on May 1, 2012.

§70.67. Violations and Penalties.

The penalties for a violation of this subchapter are prescribed by the Parks and Wildlife Code, including, but not limited to Chapter 66.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007042
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION
SUBCHAPTER C. PERSONNEL AND EMPLOYMENT POLICIES

37 TAC §1.44

The Texas Department of Public Safety (the department) proposes new §1.44, concerning Legislative Leave Pool. This new section is necessary to implement Texas Government Code, §411.0161, which requires the department to have a legislative leave policy relating to the operation of the legislative leave pool.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the new rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the new rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five-year period the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on this proposal may be submitted to Norma Cortez, Human Resources, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0161 which authorizes the commission to adopt rules and prescribe procedures relating to the operation of the legislative leave pool. Texas Government Code, §411.004(3) and §411.0161 are affected by this proposal.

§1.44. Legislative Leave Pool.

The department shall implement a legislative leave pool policy pursuant to Texas Government Code, §411.0161.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006939
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 424-5848

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CHAPTER 15. DRIVER LICENSE RULES
SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.49

The Texas Department of Public Safety (the department) proposes new §15.49, concerning Proof of Domicile. This new section is necessary to implement Texas Transportation Code, §521.1426, which requires the department to adopt rules for determining whether a domicile has been established, including rules prescribing the types of documentation the department may require from the applicant to verify the validity of the claimed domicile.

A state-issued driver license or identification certificate is a key link to public safety, privacy, and national security. For the safety, security, and peace of mind of its residents, Texas must produce a recognizably reliable source of identification in issuing licenses and, at the same time, reduce exposure to identity theft and fraud. To protect the integrity of Texas licenses, the department believes it must make these changes which create proof of domicile requirements for the issuance of a non-commercial Texas license.

The department proposes this rule to establish domicile and proof of domicile requirements in the State, to enhance security and identity features of state-issued licenses, and to address issues of fraud and misrepresentation in the application process. The department, financial institutions, retailers, law enforcement, and other entities routinely use licenses to establish a cardholder's identity. Accordingly, the proposed rule is necessary to help protect the integrity of Texas licenses for those who rely upon the licenses' authenticity.

Currently, applicants for a Texas license are not required to provide proof of domicile in Texas, which prevents the department from ensuring that licenses are issued only to applicants who are actually reside in the State. The proposed rule is necessary to ensure that the department issues licenses only to individuals who are domiciled in the State by setting the requirements for

domicile and proof of domicile, ensuring that only eligible applicants obtain a Texas license.

Under this proposed rule, applicants must reside in Texas for 30 days to establish domicile before applying for a driver license unless the applicant surrenders a valid out of state driver license. All original applicants for a Texas license would need to provide two documents from a list contained in the text of the rule which indicate a residence address in Texas. One of the documents presented would need to indicate the applicant has resided in Texas for at least 30 days prior to application unless the applicant surrenders a valid out of state driver license. Applicants who cannot provide two documents from the list must submit a Texas residency affidavit completed by another individual who will provide two documents from the list which indicate a residence address in Texas. The provisions of this proposed rule do not apply to person whose residence address is protected statutorily and persons incarcerated in a Texas Department of Criminal Justice facility.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the new rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the new rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five-year period the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be enhanced security and identity features of state-issued driver licenses and identification cards, and to address issues of fraud and misrepresentation in the application process.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Written comments on this proposal may be submitted to Ron Coleman, Program Administrator, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to ron.coleman@txdps.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The new rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Transportation Code, §521.005, and §521.1426.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.1426 are affected by this proposal.

§15.49. Proof of Domicile.

(a) To establish domicile in Texas for a non-commercial driver license or identification certificate, an applicant must reside in Texas for at least thirty (30) days prior to application. Applicants who surrender a valid, unexpired out-of-state driver license are not required to reside in Texas for at least thirty (30) days prior to application.

(b) In order to prove domicile, all original applicants for a driver license or identification certificate must present two acceptable documents verifying the applicant's residential address in Texas.

(c) The department may require individuals renewing or obtaining a duplicate driver license or identification certificate to present proof of domicile prior to issuance.

(d) In order to satisfy the requirements of this section the individual must provide two documents, which contain the applicant's name and residential address, from the acceptable proof of domicile list in subsection (e) of this section. At least one of the documents presented must demonstrate that the applicant has resided in Texas for at least thirty (30) days prior to application, unless the applicant is surrendering a valid, unexpired out-of-state driver license.

(e) Acceptable proof of domicile documents are:

(1) A current deed, mortgage, monthly mortgage statement, mortgage payment booklet, or a residential rental/lease agreement.

(2) A valid, unexpired Texas voter registration card.

(3) A valid, unexpired Texas motor vehicle registration or title.

(4) A valid, unexpired Texas boat registration or title.

(5) A valid, unexpired Texas concealed handgun license.

(6) An electric, water, natural gas, satellite television, cable television, or non-cellular telephone statement dated within ninety (90) days of the date of application.

(7) A Selective Service card.

(8) A medical or health card.

(9) A current homeowners or renters insurance policy or homeowners or renters insurance statement.

(10) A current automobile insurance policy or an automobile insurance statement.

(11) A Texas high school, college, or university report card or transcript for the current school year.

(12) A W-2 or 1099 tax form from the current tax year.

(13) Mail from financial institutions; including checking, savings, investment account, and credit card statements dated within ninety (90) days of the date of application.

(14) Mail from a federal, state, county, or city government agency dated within ninety (90) days of the date of application.

(15) A current automobile payment booklet.

(16) A pre-printed paycheck or payment stub dated within ninety (90) days of the date of application.

(17) Current documents issued by the U.S. military indicating residence address.

(18) A document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole.

(19) Current Form DS2019, I-20, or a document issued by the United States Citizenship and Immigration Services.

(f) Both documents may not be from the same source. For example, an individual may not use vehicle registration and vehicle title for the same or different vehicles from the same registration office or a water and gas bill from the same utility. Mail addressed with a forwarding label or address label affixed to the envelope or contents are not acceptable.

(g) If the individual cannot provide two documents from the acceptable proof of domicile list, the individual may submit a Texas residency affidavit submitted by:

(1) An individual who resides at the same residence address as the applicant.

(A) For related individuals, the applicant must present a document acceptable to the department indicating a family relationship to the person who completed the Texas residency affidavit and present two acceptable proof of domicile documents with the name of the person who completed the Texas residency affidavit. Acceptable documents demonstrating family relationship may include, but are not limited to:

(i) a marriage license;

(ii) military dependent identification card;

(iii) birth certificate; and

(iv) adoption records.

(B) For unrelated individuals, the individual must accompany the applicant, present a valid Texas driver license or identification card, and present two acceptable proof of domicile documents from the acceptable proof of domicile list in subsection (e) of this section.

(2) A representative of a governmental entity, not-for-profit organization, assisted care facility/home, adult assisted living facility/home, homeless shelter, transitional service provider, or group/half way house certifying to the address where the applicant resides or receives services. The organization must provide a notarized letter verifying that they receive mail for the individual.

(h) An individual is not required to comply with this section if the applicant is subject to the address confidentiality program administered by the Office of the Attorney General, judicial address confidentiality under Texas Transportation Code, §521.121, or currently incarcerated in a Texas Department of Criminal Justice facility.

(i) All documents submitted by an individual must be acceptable to the department. The department has the discretion to reject or require additional evidence to verify domicile address.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006944

Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 424-5848

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SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

37 TAC §15.163

The Texas Department of Public Safety (the department) proposes amendments to §15.163, concerning Amnesty, Incentive and Indigency Programs. The amendments to §15.163 are necessary to remove the inclusion of future surcharges in the Amnesty Program and the Indigency Program. The department has determined that the inclusion of future surcharges in these programs would require extensive computer programming that would delay the current implementation strategy. By removing future surcharges from the Amnesty and Indigency Programs, implementation of the Amnesty Program should begin in January 2011 and the Indigency Program in April 2011.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the rule is in effect there will be a fiscal implication for state governments, but no fiscal implication for local government, or local economies. There is no available data to support the number of individuals who would participate in the proposed reduction programs. Revenue estimates are based on assumptions that a percentage of individuals not currently in compliance and a percentage of individuals already in compliance would enter into the reduction programs. The estimated revenue will change should more individuals not in compliance, or individuals already in compliance, participate in the reduction programs.

The original fiscal analysis for §15.163 published in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6799) was based on existing surcharges only, and did not include surcharges not already assessed. Therefore, there is no change to the original fiscal analysis.

The annual surcharge collections averaged $167 million for fiscal years 2008, 2009, and 2010. Since 2004, the total surcharges collected are $767,161,878 and the total surcharges uncollected are $1,171,693,125.

The amnesty program will apply only to individuals currently suspended and not in compliance with the surcharge assessment. Eligible individuals will pay 10% of the total surcharges due, not to exceed $250. If 25% of the eligible individuals participate annually in the amnesty program, the estimated collections would be approximately $18 million.

The indigency program defined by this rule will apply only to individuals living at or below 125% of the federal poverty level. Eligible individuals will pay 10% of the total surcharges due, not to exceed $250. Eligible individuals may be comprised of those currently paying and those not currently paying. For 100% of individuals currently paying, the estimated fees waived are approximately $11 million. For 100% of individuals not paying, the estimated fees collected are approximately $17 million. Therefore, the indigency program could see additional collections or a loss of uncollected revenue.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. Anticipated economic costs to individuals who are required to comply with the rule as proposed cannot be determined as each individual's economic costs will be dependent upon the amount of surcharges on the individual's account when this section is implemented. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has also determined that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing the rule will be increased public safety on the roadways. Affected license holders will be provided the opportunity to maintain licensing privileges, thereby ensuring the license holder remains in compliance with driver license law and the Driver Responsibility Program. Holders of valid driver licenses are subject to review of their continued ability to safely operate a motor vehicle through the renewal process and are more likely to maintain insurance.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce the risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the proposal.

Comments on the proposal may be submitted to Rebekah Hibbs, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDRuleComments@txdps.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §708.157(a), which authorizes the department to establish a periodic amnesty program for holders of a driver's license on which a surcharge has been assessed for certain offenses; and Texas Transportation Code, §708.157(c), which requires the department to establish an indigency program for holders of a driver's license on which a surcharge has been assessed for certain offenses.

Texas Government Code, §411.004(3) and Texas Transportation Code, §708.157 are affected by this proposal.

§15.163. Amnesty, Incentive and Indigency Programs.

(a) Amnesty program. The department is authorized to provide for a periodic amnesty program under the Driver Responsibility Program, Texas Transportation Code, §708.157(a). Periodic amnesty reductions will be offered at the department's discretion, and the public will be notified of each amnesty period.

(1) - (2) (No change.)

(3) The total amount is based on all offenses on the driver record at the beginning of each amnesty period. Annual [~~, including annual~~] surcharges that have not been assessed for the offenses will be waived. If a new offense is reported and a new surcharge assessed after the beginning of the amnesty period, the reduction will not apply to the new surcharge.

(4) - (10) (No change.)

(b) (No change.)

(c) Indigency program. The department is required to provide for an indigency program under the Driver Responsibility Program, Texas Transportation Code, §708.157(c).

(1) - (4) (No change.)

(5) The total amount is based on all offenses on the driver record at the beginning of the indigency period. Annual [~~, including annual~~] surcharges that have not been assessed for the offenses will be waived.

(6) - (10) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201006946
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 424-5848

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CHAPTER 16. COMMERCIAL DRIVER LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §16.15

The Texas Department of Public Safety (the department) proposes new §16.15, concerning Proof of Domicile. This new section is necessary to implement Texas Transportation Code, §522.0225, which requires the department to adopt rules for determining whether a domicile has been established under Texas Transportation Code, §522.022, including rules prescribing the types of documentation the department may require from the applicant to verify the validity of the claimed domicile.

A state-issued driver license or identification certificate is a key link to public safety, privacy, and national security. For the safety, security, and peace of mind of its residents, Texas must produce a recognizably reliable source of identification in issuing licenses and, at the same time, reduce exposure to identity theft and fraud. To protect the integrity of Texas licenses, the department believes it must make these changes which create proof of domicile requirements for the issuance of a commercial Texas license.

The department proposes this rule to establish domicile and proof of domicile requirements in the State, to enhance security and identity features of state-issued licenses, and to address issues of fraud and misrepresentation in the application process. The department, financial institutions, retailers, law enforcement, and other entities routinely use licenses to establish a cardholder's identity. Accordingly, the proposed rule is necessary to help protect the integrity of Texas licenses for those who rely upon the licenses' authenticity.

Currently, applicants for a Texas license are not required to provide proof of domicile in Texas, which prevents the department from ensuring that licenses are issued only to applicants who are actually reside in the State. The proposed rule is necessary to ensure that the department issues licenses only to individuals who are domiciled in the State by setting the requirements for domicile and proof of domicile, ensuring that only eligible applicants obtain a Texas license.

Under this proposed rule, all original applicants for a Texas license would need to provide two documents from a list contained in the text of the rule which indicate a residence address in Texas. Applicants who cannot provide two documents from the list must submit a Texas residency affidavit completed by another individual who will provide two documents from the list which indicate a residence address in Texas. The provisions of this proposed rule do not apply to person whose residence address is protected statutorily and persons incarcerated in a Texas Department of Criminal Justice facility.

Cheryl MacBride, Deputy Director, Services, has determined that for each year of the first five-year period the new rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the new rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five-year period the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be enhanced security and identity features of state-issued commercial driver licenses, and to address issues of fraud and misrepresentation in the application process.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Written comments on the proposal may be submitted to Ron Coleman, Program Administrator, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to ron.coleman@txdps.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

The new rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Transportation Code, §521.005, and §522.0225.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §522.0225 are affected by this proposal.

§16.15. Proof of Domicile.

(a) In order to prove domicile, all original applicants for a commercial driver license must present two acceptable documents verifying the applicant's domicile address in Texas.

(b) The department may require individuals renewing or obtaining a duplicate commercial driver license to present proof of domicile prior to issuance.

(c) In order to satisfy the requirements of this section the individual must provide two documents, which contain the applicant's name and domicile address, from the acceptable proof of domicile list in subsection (d) of this section.

(d) Acceptable proof of domicile documents are:

(1) A deed, mortgage, monthly mortgage statement, current mortgage payment booklet, or a current residential rental/lease agreement.

(2) A valid, unexpired Texas voter registration card.

(3) A valid, unexpired Texas motor vehicle registration or title.

(4) A valid, unexpired Texas boat registration or title.

(5) A valid, unexpired Texas concealed handgun license.

(6) An electric, water, natural gas, satellite television, cable television, or non-cellular telephone statement dated within ninety (90) days of the date of application.

(7) A Selective Service card.

(8) A medical or health card.

(9) A current homeowners or renters insurance policy or homeowners or renters insurance statement.

(10) A current automobile insurance policy or an automobile insurance statement.

(11) A Texas high school, college, or university report card or transcript for the current school year.

(12) A W-2 or 1099 tax form from the current tax year.

(13) Mail from financial institutions; including checking, savings, investment account, and credit card statements dated within ninety (90) days of the date of application.

(14) Mail from a federal, state, county, or city government agency dated within ninety (90) days of the date of application.

(15) A current automobile payment booklet.

(16) A pre-printed paycheck or payment stub dated within ninety (90) days of the date of application.

(17) Current documents issued by the U.S. military indicating residence address.

(18) A document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole.

(e) Both documents may not be from the same source. For example, an individual may not use vehicle registration and vehicle title for the same or different vehicles from the same registration office or a water and gas bill from the same utility. Mail addressed with a forwarding label or address label affixed to the envelope or contents are not acceptable.

(f) If the individual cannot provide two documents from the acceptable proof of domicile list, the individual may submit a Texas residency affidavit submitted by:

(1) An individual who resides at the same residence address as the applicant.

(A) For related individuals, the applicant must present a document acceptable to the Department indicating a family relationship to the person who completed the Texas residency affidavit and present two acceptable proof of domicile documents with the name of the person who completed the Texas residency affidavit. Acceptable documents demonstrating family relationship may include but are not limited to:

(i) a marriage license;

(ii) military dependent identification card;

(iii) birth certificate; and

(iv) adoption records.

(B) For unrelated individuals, the individual must accompany the applicant, present a valid Texas driver license or identification card, and present two acceptable proof of domicile documents from the acceptable proof of domicile list in subsection (d) of this section.

(2) A representative of a governmental entity, not-for-profit organization, assisted care facility/home, adult assisted living facility/home, homeless shelter, transitional service provider, or group/half way house certifying to the address where the applicant resides or receives services. The organization must provide a notarized letter verifying that they receive mail for the individual.

(g) An individual is not required to comply with this section if the applicant is subject to the address confidentiality program administered by the Office of the Attorney General, judicial address confidentiality under Texas Transportation Code, §521.121, or currently incarcerated in a Texas Department of Criminal Justice facility.

(h) All documents submitted by an individual must be acceptable to the department. The department has the discretion to reject or require additional evidence to verify domicile address.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006945
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 424-5848

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PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 265. ADMISSION

37 TAC §265.1

The Commission on Jail Standards proposes an amendment to §265.1, concerning Receiving, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§265.1. Receiving.

The receiving officer shall determine that each inmate is being committed by a duly authorized officer. If only one jailer [~~corrections officer~~] is on duty, the delivering officer should stay on duty, the delivering officer should stay until the inmate is locked into the facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006893
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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37 TAC §265.2

The Commission on Jail Standards proposes an amendment to §265.2, concerning Search, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officer(s) with jailer(s).

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§265.2. Search.

(a) A thorough pat or frisk search shall be conducted on each inmate upon entry into the facility and prior to booking.

(b) When facility personnel reasonably believe it to be necessary, inmates should undergo a thorough strip search for weapons and contraband which may pose a threat to the security or safety of the facility. The strip search shall be conducted by jailer(s) [~~corrections officer(s)~~] of the same gender in a reasonable and dignified manner and place.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006894
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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37 TAC §265.11

The Commission on Jail Standards proposes an amendment to §265.11, concerning Shower, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§265.11. Shower.

Following booking and prior to housing assignment, inmates should be showered. Inmate showers shall be supervised by a jailer [~~corrections officer~~] of the same gender.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006895
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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CHAPTER 271. CLASSIFICATION AND SEPARATION OF INMATES

37 TAC §271.3

The Commission on Jail Standards proposes an amendment to §271.3, concerning Training, in order to standardize language throughout the Administrative Code by replacing the term staff with jailers and clarifying the requirement that a licensed jailer conduct the classification of inmates.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There could be an economic cost to counties that have allowed individuals other than certified jailers to conduct inmate classifications.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures es-

tablishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§271.3. Training.

The plan shall provide that all jailers [~~staff~~] whose duties include classification, shall undergo at least four hours of training on the principles, procedures and instruments for classification assessments, housing assignments, reassessments and inmate needs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

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Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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CHAPTER 273. HEALTH SERVICES

37 TAC §273.8

The Commission on Jail Standards proposes an amendment to §273.8, concerning Health Services, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.8. Health Services.

For the purpose of establishing a continuity of care system for offenders with mental impairments, elderly, physically disabled, terminally ill, or significantly ill, the Texas Council on Offenders with Mental Impairments (TCOMI) and the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) and the Texas Commission on Jail Standards (TCJS) agree to the following Memorandum of Understanding.

(1) - (3) (No change.)

(4) Texas Commission on Law Enforcement Officer Standards and Education shall:

(A) develop and publish a mental health officer training inservice curriculum to train law enforcement officers and county jailers [~~corrections officers~~];

(B) establish a Mental Health Officer Certification Program; and

(C) develop and publish an inservice training course for law enforcement officers and county jailers [~~corrections officers~~] that is concerned with individuals with special needs.

(5) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

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Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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CHAPTER 275. SUPERVISION OF INMATES

37 TAC §275.1

The Commission on Jail Standards proposes an amendment to §275.1, concerning Regular Observation by Corrections Officers, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officers with jailers and clarifying the time inmates must be observed.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There could be an economic cost to counties that have allowed individuals other than certified jailers to conduct inmate classifications.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.1. Regular Observation by Jailers [~~Corrections Officers~~].

Every facility shall have the appropriate number of jailers [~~corrections officers~~] at the facility 24 hours each day. Facilities shall have an established procedure for visual, face-to-face observation of all inmates by no less than once every 60 minutes [~~corrections officers at least once every hour~~]. Observation shall be performed no less than once [~~at least~~] every 30 minutes in areas where inmates known to be assaultive, potentially suicidal, mentally ill, or who have demonstrated bizarre behavior are confined. There shall be a two-way voice communication capability between inmates and jailers [~~staff~~] at all times. Closed circuit television may be used, but not in lieu of the required personal observation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006897
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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37 TAC §275.5

The Commission on Jail Standards proposes an amendment to §275.5, concerning Census, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.5. Census.

Inmates shall be physically counted by a jailer [~~corrections officer~~] at frequent and regular intervals, no less than once per day.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006898
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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37 TAC §275.8

The Commission on Jail Standards proposes new §275.8, concerning Supervision Outside the Security Perimeter. This new section will allow either jailers or peace officers licensed by the Texas Commission on Law Enforcement Officer Standards and Education to supervise inmates when they are outside the security perimeter of the jail.

Adan Munoz, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Munoz has also determined that for each year of the first five years the new section is in effect the public benefits anticipated as a result of enforcing the new section as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The new section is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this new section are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.8. Supervision Outside the Security Perimeter.

Inmates shall be observed by a peace officer or a jailer licensed by the Texas Commission on Law Enforcement Officer Standards and Education when outside the security perimeter. The sheriff/operator shall have an established procedure for documented, face-to-face observation of all inmates no less than once every 60 minutes. Observation shall be performed no less than once every 30 minutes at remote holding or areas where inmates known to be assaultive, potentially suicidal, mentally ill, or who have demonstrated bizarre behavior are confined. One jailer or licensed peace officer shall be provided on each floor of the facility peace officer per 48 inmates or increment thereof on each floor for direct inmate supervision, where 10 or more inmates are detained, with no less than 1 jailer or licensed peace officer.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006899

Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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CHAPTER 279. SANITATION

37 TAC §279.1

The Commission on Jail Standards proposes an amendment to §279.1, concerning Sanitation Plan, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§279.1. Sanitation Plan.

Each facility shall have and implement a written plan, approved by the commission, for the maintenance of an acceptable level of cleanliness and sanitation throughout the facility. Such plan shall provide for:

(1) a regular daily schedule for the work and inspections necessary to keep the facility clean; which schedule shall be assigned and supervised by jailers [~~corrections officers~~] who have the responsibility for keeping the facility clean and making regular sanitation inspections;

(2) water and sewage systems not part of a city system and food preparation areas shall be inspected at least annually by health authorities and record kept for each inspection;

(3) adequate and safe cleaning equipment;

(4) water tight garbage containers with tight fitting covers in the kitchen;

(5) the maintenance of toilets, lavatories, showers, and other equipment throughout the facility in good working order;

(6) the maintenance of all counters, shelves, tables, equipment, and utensils with which food or drink comes into contact in a clean condition and in good repair;

(7) clean washing aids, such as brushes, dishcloths, and other hand aids used in dish washing operations and for no other purposes;

(8) a well ventilated place for storing and drying mops and other cleaning tools;

(9) the continuous compliance of the water system and sewage system with the minimum requirements for such public systems; and

(10) the prohibition of excessive storage of food in cells and day rooms.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006901
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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CHAPTER 289. WORK ASSIGNMENTS

37 TAC §289.4

The Commission on Jail Standards proposes an amendment to §289.4, concerning Outside Security Perimeter work assignments for inmates, in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officers with jailers.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§289.4. Outside Security Perimeter.

Only inmates classified as minimum custody should be assigned to work outside the security perimeter and should be supervised by jailers [~~corrections officers~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006905
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8236

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

The Texas Department of Motor Vehicles (department) proposes amendments to §217.28, Specialty License Plates, Symbols, Tabs, and Other Devices, and §217.62, Requirement for Non-repairable or Salvage Vehicle Title.

EXPLANATION OF PROPOSED AMENDMENTS

Amendments to §217.28 are necessary to streamline the process for registration validation for various plates and to clarify the policy regarding license plate replacement if a motor vehicle or license plate is stolen.

The amendments to §217.62 are necessary to clarify that the rules concerning owner retained vehicles apply to vehicles that were titled in Texas.

Amendments to §217.28(d)(2) update the language to include the registration period. Previously, the department embossed every license plate listed in this subparagraph plate with the expiration date of the registration. These plates no longer contain this feature, but have a registration sticker, instead.

Amendments to §217.28(d)(3) change the wording to include that some of the listed license plates, such as the state official license plates, will not have a renewal specialty license plate fee. References to specific license plate replacement in §217.28(d)(3)(E) are deleted as that subject matter is covered in 43 TAC §217.22.

Amendments to §217.28(f)(2) replace the title of the paragraph, "Interim replacement tags," with the current terminology of "temporary registration insignia." Paragraph (3) of §217.28(f) is clarified to state that the same alphanumeric sequenced plate will not be replaced until the plate or motor vehicle is recovered. Until recovery, the owner of the motor vehicle may be issued another alphanumeric sequenced plate at no charge.

Amendments to §217.62 clarify the applicability of owner retained vehicles to vehicles that were titled in Texas. Transportation Code, §501.093 and §501.094 require an insurance company or a self-insured person to submit a report to the department stating that the motor vehicle was damaged. The owner must apply for a salvage or non-repairable title. If the motor vehicle is not titled in Texas, then the issuing state will title the vehicle in accordance with its laws. Such a title could then be surrendered to Texas for a comparable Texas title. The amendments to §217.62 clarify that the owner-retained statutes apply only to Texas titles.

FISCAL NOTE

Linda Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Randy Elliston, Director, Vehicle Titles and Registration Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Elliston has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments is a clarification of the registration renewal process, the procedure for replacement plates if a motor vehicle or the license plates are stolen, and the title process for an owner-retained damaged vehicle.

There are no anticipated economic costs for persons required to comply with the amendments since this is the procedure that is currently followed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the amendments to §217.28 and §217.62 may be submitted to Randy Elliston, Director, Vehicle Titles and Registration Division, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on January 24, 2011.

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.28

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the Texas Motor Vehicles Board with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 501, Subchapter E, and Transportation Code, §§502.0021, 502.184, 502.1841, and Transportation Code, §504.002.

§217.28. Specialty License Plates, Symbols, Tabs, and Other Devices.

(a) - (c) (No change.)

(d) Specialty license plate renewal.

(1) Renewal deadline. If a personalized license plate is not renewed within 60 days after its expiration date, a subsequent renewal application will be treated as an application for new personalized license plates.

(2) Length of validation. With the following exceptions, all specialty license plates, symbols, tabs, or other devices shall be valid for 12 months from the month of issuance or for a prorated period of at least 12 months coinciding with the expiration of registration.

(A) Five year period. The following license plates and registration numbers are issued for a five-year period:

(i) Antique Vehicle and Antique Motorcycle license plates and Antique tabs;

(ii) Military Vehicle license plates and registration numbers;

(iii) Parade license plates; and

(iv) Foreign Organization license plates.

(B) March expiration dates. The registration for the following license plates expires [~~expire~~] each March 31:

(i) Congressional Medal of Honor;

(ii) Cotton Vehicle; and

(iii) Disaster Relief.

(C) June expiration dates. The registration for the Honorary Consul license plate expires [~~plates expire~~] each June 30.

(D) September expiration dates. The registration for the Log Loader license plate expires [~~plates expire~~] each September 30.

(E) December expiration dates. The registration for the following license plates expires [~~expire~~] each December 31:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(F) Except as otherwise provided in this paragraph, if a vehicle's registration period is other than 12 months, the expiration date of the specialty license plate, symbol, tab, or other device will be set to align it with the expiration of registration.

(3) Renewal.

(A) Renewal notice. Approximately 60 days before the expiration date of a specialty license plate, symbol, tab, or other device, the department will send each owner a renewal notice that includes the amount of the specialty plate fee and the registration fee.

(B) Return of notice. The owner must return the fee and any prescribed documentation to the tax assessor-collector of the county in which the owner resides, except that the owner of a vehicle with one of the following license plates must return the documentation and specialty license plate fee, if applicable, directly to the department and submit the registration fee to the county tax assessor-collector:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(C) Return of documents. The owner of a vehicle with Congressional Medal of Honor license plates must return the documentation and specialty license plate fee, if any, directly to the department.

(D) Expired plate numbers. The department will retain a specialty license plate number for 60 days after the expiration date of the plates if the plates are not renewed on or before their expiration date. After 60 days the number may be reissued to a new applicant. All specialty license plate renewals received after the expiration of the 60 days will be treated as new applications.

(E) Issuance of validation insignia. On receipt of a completed license plate renewal application and prescribed documentation, the department will issue registration validation insignia as specified in §217.22 of this subchapter[~~, except for those plates listed in clause (i) or (ii) of this subparagraph or~~] unless this section or other law requires the issuance of new license plates to the owner.

~~*[(i)* New license plates will be issued when the following specialty license plates are renewed:]~~

~~*[(I)* Antique Motorcycle;]~~

~~*[(II)* Antique Vehicle;]~~

~~*[(III)* Congressional Medal of Honor;]~~

~~*[(IV)* County Judge;]~~

~~*[(V)* Disaster Relief;]~~

~~*[(VI)* Federal Administrative Law Judge;]~~

~~*[(VII)* Military Vehicle;]~~

~~*[(VIII)* Parade;]~~

~~*[(IX)* State Judge;]~~

~~*[(X)* State Official;]~~

~~*[(XI)* U.S. Congress--House;]~~

~~*[(XII)* U.S. Congress--Senate; and]~~

~~*[(XIII)* U.S. Judge.]~~

~~*[(ii)* New license plates shall be issued at no extra cost every seven years from the date of issuance for specialty license plates and renewed personalized license plates, in accordance with the provisions of §217.22 of this subchapter.]~~

(F) Lost or destroyed renewal notices. If a renewal notice is lost, destroyed, or not received by the vehicle owner, the specialty license plates, symbol, tab, or other device may be renewed if the owner provides acceptable personal identification along with the appropriate fees and documentation. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) (No change.)

(f) Replacement.

(1) Application. When specialty license plates, symbols, tabs, or other devices are lost, stolen, or mutilated, the owner shall apply directly to the county tax assessor-collector for the issuance of replacements, except that Log Loader license plates must be reapplied for and accompanied by the prescribed fees and documentation.

(2) Temporary registration insignia [~~Interim replacement tags~~]. If the specialty license plate, symbol, tab, or other device is lost, destroyed, or mutilated to such an extent that it is unusable, and if issuance of a replacement license plate would require that it be remanufactured, the owner must pay the statutory replacement fee, and

the department will issue a temporary tag for interim use. The owner's new specialty license plate number will be shown on the temporary tag unless it is a personalized license plate, in which case the same personalized license plate number will be shown.

(3) Stolen specialty license plates.

(A) The department or county tax assessor-collector will not approve the issuance of replacement license plates with the same personalized license plate number if [~~when~~] the department's records indicate either the vehicle displaying the personalized license plates or the license plates are [~~that the vehicle displaying the personalized license plates, symbols, tabs, or other devices or the license plates, symbols, tabs, or other devices themselves were~~] reported as stolen to law enforcement. The owner will be directed to contact the department for another personalized plate choice. [~~On expiration or recovery of the stolen vehicle or license plates, symbols, tabs, or other devices, the department will issue, at the owner's request, replacement license plates, symbols, tabs, or other devices bearing the same personalized number as those that were stolen.~~]

(B) The owner may select a different personalized number to be issued at no charge with the same expiration as the stolen specialty plate. On recovery of the stolen vehicle or license plates, the department will issue, at the owner's or applicant's request, replacement license plates, bearing the same personalized number as those that were stolen.

(g) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201006998
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER D. NON-REPAIRABLE AND SALVAGE MOTOR VEHICLES

43 TAC §217.62

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the Texas Motor Vehicles Board with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 501, Subchapter E, and Transportation Code, §§502.0021, 502.184, 502.1841, and Transportation Code, §504.002.

§217.62. Requirement for Non-repairable or Salvage Vehicle Title.

(a) - (b) (No change.)

(c) Owner retained vehicles.

(1) An owner may retain a vehicle only as provided by this subsection and if the vehicle was titled in Texas before it became a salvage or non-repairable vehicle.

(2) [~~(1)~~] When an insurance company pays a claim on a non-repairable or salvage motor vehicle and does not acquire ownership of the motor vehicle, the company shall submit to the department before the 31st day after the date of the payment of the claim, on a form prescribed by the department, a report stating that:

(A) the insurance company has paid a claim on the non-repairable or salvage motor vehicle; and

(B) the insurance company has not acquired ownership of the non-repairable or salvage motor vehicle.

(3) [~~(2)~~] Upon receipt of the report described in paragraph (2) [~~(1)~~] of this subsection, the department will place an appropriate notation on the motor vehicle record to prevent registration and transfer of ownership prior to the issuance of a salvage or non-repairable vehicle title.

(4) [~~(3)~~] The owner who retained the non-repairable or salvage motor vehicle to which this subsection applies shall obtain a non-repairable or salvage vehicle title, as provided by §217.63 of this subchapter, before selling or otherwise transferring the non-repairable or salvage motor vehicle.

(5) [~~(4)~~] Until a non-repairable or salvage vehicle title, or a comparable out-of-state ownership document, has been issued for an owner-retained non-repairable or salvage vehicle, the owner of the motor vehicle may not sell or otherwise transfer ownership of the vehicle.

(6) [~~(5)~~] The owner of an owner retained non-repairable or salvage motor vehicle may not operate or permit operation of the motor vehicle on a public highway, until the motor vehicle is rebuilt, titled as a rebuilt salvage motor vehicle or rebuilt non-repairable motor vehicle, if applicable, and is registered in accordance with Subchapter B of this chapter (relating to Motor Vehicle Registration).

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201006999
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 23, 2011
For further information, please call: (512) 463-8683

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER A. VOTER REGISTRATION

1 TAC §§81.11 - 81.17, 81.19 - 81.28

The Office of the Secretary of State (SOS) adopts amendments to §§81.11 - 81.17 and §§81.19 - 81.28, concerning disbursement of funds under the Election Code, Chapter 19. Section 81.20 and §81.23 are adopted with changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9446). The other sections are adopted without changes and will not be republished.

These rules designate which goods and services are reimbursable with Chapter 19 funds and outline procedures to be followed by county voter registrars to obtain such reimbursement. Sections 81.11 - 81.17, 81.19, 81.21, 81.22, and 81.24 - 81.28 organize, update, and clarify existing language but do not result in significant changes.

Section 81.20 is being adopted with changes to clarify that the maintenance and upkeep of equipment purchased with Chapter 19 funds refers to proper property management practices, not annual license or maintenance fees. Section 81.23 is being adopted with changes to reinstate travel advances as an allowable cost, which had been eliminated in the proposed rule.

The following comments were received from interested parties regarding the proposed rules.

§81.13. Allowable Uses of Chapter 19 Funds.

The Tax Assessor-Collectors Association of Texas argued that §81.13 requiring certification that the commissioners court did not consider the availability of Chapter 19 funds in adopting the county budget is redundant and unnecessary because it is already codified in the Election Code. Travis County suggested §81.13 be amended to allow for a blanket certification at the beginning of each year rather than with each Chapter 19 reimbursement request. Galveston County claimed it will be a burden because it will take significant time to obtain the certification from the commissioners court. Williamson County expressed similar concerns.

SOS Response: With the exception of the items identified in §81.14, the certification is intended to allow the county to identify what is considered a cost beyond normal day-to-day operations rather than for SOS to unilaterally make those determinations given the varied demographics throughout Texas. The certification should not result in an administrative burden since it will be incorporated into the electronic submission process through a certification statement that includes other assurances (e.g., compliance with the administrative rules in this title), which serve as a reminder to the submitter of his or her obligation to be cognizant of the applicable rules and regulations. The statement will be as simple as a checkbox and does not need to be obtained from the commissioners court. Accordingly, the rule has been adopted without changes to the proposal.

§81.14. Normal Day-To-Day Operation--Defined.

Travis County recommended adding software maintenance to §81.14. Williamson County inquired as to whether contracting with a paper shredding company will be considered an eligible expense. Lavaca County inquired as to whether the rules will allow for Internet virus protection.

SOS Response: Section 81.14 lists examples of items that are considered "normal day-to-day operational" costs and therefore prohibited from Chapter 19 reimbursement. For example, "repair and warranty of office equipment" was removed from the rule because the language had been interpreted to include annual license and maintenance fees. By removing the prohibitive language, the expense is considered eligible. The other expenses presented as potential Chapter 19 expenses, such as a paper shredding company hired to dispose of a large volume of voter registration documents or Internet virus software, are eligible if the costs will benefit voter registration activities. However, items or services purchased with Chapter 19 funds that are not used exclusively for voter registration activities must be prorated.

§81.15. Funding Period.

Williamson County suggested that extending the reimbursement submission deadline in §81.15 from 30 days from the date of payment to the vendor to six months was excessive.

SOS Response: The SOS has received overwhelming support for this change; however, counties are free to continue to submit reimbursement requests within 30 days of payment to the vendor.

§81.17. Competitive Bidding Required.

Williamson County recommended either removing the competitive bidding threshold of $5,000 in §81.17 and deferring to county procurement guidelines or adopting different levels of bidding requirements depending on the amount of the purchase.

SOS Response: Counties may use county procurement procedures and guidelines; however, because Chapter 19 is state-funded, the county regulations may not be in conflict or less restrictive than state regulations. In instances where they are, state regulations prevail. It should be noted that state regulations require informal bids for purchase over $5,000 but less than $25,000 (e.g., three quotes). Formal bids are required for purchases of $25,000 or more.

§81.20. Ownership of Equipment Purchased with Chapter 19 Funds.

It was noted by SOS staff that the rule included a reference to maintenance and repair being the county's responsibility. The intent of §81.20 is for the county to properly maintain the equipment through adequate property management practices. Section 81.20 has been modified accordingly in this adoption.

§81.21. Records Maintenance and Payment Reviews.

Travis County recommended adjusting §81.21 to align the records retention period to coincide with the two-year retention period for election records. Williamson County noted the reference to temporary employee signed timesheets appears to have been removed from the rules.

SOS Response: The retention period in the rule is reflective of the agency retention schedule. Three years is the standard retention period for financial documents, which is set by the Texas State Library and Archives Commission. The reference to temporary timesheets was not removed in the proposed rules. Rather, it was moved from §81.22 to §81.21.

§81.23. Travel Using Chapter 19 Funds Authorized.

Randall County sought clarification as to whether full-time county staff can be reimbursed with Chapter 19 funds for travel to voter registration-related conferences and seminars even if that staff member is not assigned exclusively to voter registration duties. In addition, the county inquired as to the percentage of travel that will be reimbursable with Chapter 19 funds. Travis County inquired as to whether reimbursement can be based on actual costs if those costs exceed the state rates but are within the county rates. Lastly, the Tax Assessor-Collectors Association of Texas and Lavaca County suggested that the prohibition of travel advances will be an undue burden on smaller counties.

SOS Response: The intent of the rule is to allow for full reimbursement of travel (i.e., 100%) within the travel regulations and applicable rates outlined in this chapter for full-time county personnel with significant voter registration-related duties regardless of whether the staff member has other assignments within the county. Reimbursements cannot exceed state rates; however, the state has adopted the federally approved rates, which should help minimize variances in rates. The SOS has determined that travel advances will be allowed and the rule has been modified accordingly.

These rules take effect when the Chapter 19 electronic web-based application described in §81.16 is deployed for official county use, which is projected to be January 1, 2011.

Statutory Authority

The amendments are adopted under the Election Code, §19.002(b) and §31.003, which provides the SOS with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Election Code and other election laws, and in performing such duties, to prepare detailed and comprehensive written directives and instructions based on such laws, and to adopt rules consistent with the Election Code.

The Election Code, Chapter 19, §19.002(b) is affected by these adopted amendments.

§81.20. Ownership of Equipment Purchased with Chapter 19 Funds.

(a) Items and equipment purchased with Chapter 19 funds are the property of the county.

(b) The county is responsible for the upkeep and maintenance of such items and equipment through adequate property management practices.

(c) If items or equipment that were originally purchased with Chapter 19 funds are no longer needed or useful for voter registration purposes, the items or equipment may be transferred, with the voter registrar's approval, to other county uses.

(d) If the items or equipment are no longer needed by the county, they may be disposed of in the manner set by county guidelines.

(e) Proceeds received from the sale of items or equipment purchased with Chapter 19 funds may be used only for voter registration purposes in a manner consistent with these rules.

§81.23. Travel Using Chapter 19 Funds Authorized.

(a) Chapter 19 funds may be used to pay travel expenses incurred by the voter registrar and full-time permanent voter registration staffers to attend voter registration and/or election administration seminars and demonstrations that directly advance voter registration efforts.

(b) All voter registrars who seek reimbursement from Chapter 19 funds should plan their travel to achieve maximum economy and efficient means of transportation.

(c) The following limitations apply to Chapter 19 travel:

(1) The lowest available rates and fares shall be utilized.

(2) Reimbursements will be made based on actual costs.

(3) Lodging, per diem, and mileage rates may not exceed those set by the Texas Comptroller of Public Accounts.

(4) Reimbursements for lodging, per diem (including partial per diem), and mileage rates may not be charged to Chapter 19 unless the employee conducts travel beyond 25 miles of his or her designated headquarters.

(5) Travel by personal car is reimbursable at the rate set by the Texas Comptroller of Public Accounts per mile with mileage computed using the originating county seat as the departure point and computing final mileage using the mapping tool on the Chapter 19 web-based application.

(6) If more than one person is traveling from the same headquarters to the same destination, the travelers are to ride together in a single automobile if practicable.

(7) The rental of luxury cars will be disallowed, except in special circumstances requiring the use of large cars, i.e., several employees are traveling together or large volumes of equipment or supplies are being transported.

(8) Chapter 19 funds will not cover expenses for first class accommodations, tips, gratuities, valet parking or alcoholic beverages.

(d) Chapter 19 travel reimbursements must be submitted for each traveler within 30 days of the completion of travel via the Chapter 19 web-based application.

(e) Travel reimbursement requests must include the itemized amounts for airfare, rental cars, mileage, meals, lodging, seminar registration fees, and miscellaneous expenses. All receipts must be maintained in accordance with §81.21 of this title (relating to Records Maintenance and Payment Reviews).

(f) Travel advances will be approved, on a case-by-case basis. Travel advance funding will not be made for meals, hotel taxes or miscellaneous expenses. Travel advance requests must be submitted through the web-based application in the form of a travel request and

include a Chapter 19 Purchase Request for each traveler. No further Chapter 19 Purchase Request will be processed until the final accounting of any advanced travel is received.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007003
John Sepehri
General Counsel
Office of the Secretary of State
Effective date: December 30, 2010
Proposal publication date: October 22, 2010
For further information, please call: (512) 463-5650

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.508

The Texas Health and Human Services Commission (HHSC) adopts the amendment to §355.508, concerning Reimbursement Methodology for Transition Assistance Services, without changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9455) and will not be republished.

Background and Justification

The Department of State Health Services developed the Youth Empowerment Services (YES) waiver to provide intensive, community-based services to children and youth who meet the criteria for inpatient psychiatric hospitalization. The waiver implemented a pilot program to provide certain services to children and adolescents in Bexar and Travis counties.

Transition Assistance Services, known as Transitional Services in the YES waiver, are a covered service in the waiver.

The rule amendment adds Transitional Services from the YES waiver to the list of services included in the reimbursement methodology for Transition Assistance Services.

Comments

The 30-day comment period ended November 22, 2010. During this period, HHSC received no comments regarding the proposed amendment to this rule.

Legal Authority

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006933
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §358.107

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §358.107, concerning coverage groups, in Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities, without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8841) and, therefore, the section will not be republished.

Background and Justification

The amendment is adopted to add the Medicaid Buy-In for Children program (MBIC) to the list of Medicaid-funded programs for the elderly and people with disabilities covered under the Texas State Plan for Medical Assistance. The list in §358.107 names both optional and mandatory coverage groups. MBIC is an optional coverage group allowed under the federal Deficit Reduction Act of 2005. The Texas Legislature authorized and funded the implementation of MBIC in Texas in Senate Bill 187, 81st Legislature, 2009, Regular Session. The program helps pay medical bills for children with disabilities whose families have too much income to get traditional Medicaid.

Eligibility rules for MBIC are being adopted elsewhere in this issue of the *Texas Register* under Title 1, Chapter 361 of the Texas Administrative Code (1 TAC Chapter 361).

Comments

HHSC received no comments regarding adoption of the amendment, including at a public hearing held in Austin on October 22, 2010.

Legal Authority

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority and §531.02444, which requires HHSC to implement a Medicaid buy-in program for children with disabilities; and the Human Resources Code, §32.021 and Texas Government Code §531.021, which au-

thorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

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Steve Aragon
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Texas Health and Human Services Commission
Effective date: January 1, 2011
Proposal publication date: October 1, 2010
For further information, please call: (512) 424-6900

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CHAPTER 361. MEDICAID BUY-IN FOR CHILDREN PROGRAM

1 TAC §§361.101, 361.103, 361.105, 361.107, 361.109, 361.111, 361.113, 361.115, 361.117, 361.119

The Texas Health and Human Services Commission (HHSC) adopts new §361.101, concerning overview and purpose; §361.103, concerning definitions; §361.105, concerning applying and providing information; §361.107, concerning nonfinancial requirements; §361.109, concerning third-party resources; §361.111, concerning income; §361.113, concerning employer-sponsored health insurance; §361.115, concerning cost sharing; §361.117, concerning notice of eligibility determination and right to appeal; and §361.119, concerning medical effective date, in Chapter 361, Medicaid Buy-In for Children Program (MBIC). New §361.107 and §361.117 are adopted with changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8842) and will be republished. New §§361.101, 361.103, 361.105, 361.109, 361.111, 361.113, 361.115, and 361.119 are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8842) and will not be republished.

Background and Justification

The new sections are adopted to place in rule the eligibility requirements for MBIC. MBIC is a Medicaid buy-in program for children with disabilities who do not qualify for Supplemental Security Income (SSI) for a reason other than disability. A child does not have to have applied for SSI in order to meet eligibility requirements for MBIC. MBIC is an optional Medicaid eligibility coverage group allowed under the federal Deficit Reduction Act of 2005. The Texas Legislature authorized the implementation of MBIC in Texas in Senate Bill 187, 81st Legislature, 2009, Regular Session.

The new program helps pay medical bills for children with disabilities whose families have too much income to get traditional Medicaid. The family may be required to pay a monthly premium as a condition of eligibility. The amount of the premium is based on a sliding scale, dependent upon family income and whether the child is covered under a parent's employer-sponsored health insurance plan. The new rules govern the MBIC eligibility requirements, including the calculation and payment of the monthly premium.

A related rule is adopted under Title 1, Chapter 358 of the Texas Administrative Code elsewhere in this issue of the *Texas Register.*

Comments

HHSC received no comments regarding adoption of the new sections, including at a public hearing held in Austin on October 22, 2010.

HHSC made minor editorial changes to §361.107 and §361.117 to clarify and improve the accuracy of the sections. In §361.107(g), HHSC changed the word "person" in the proposal to "child" in the adopted rule In §361.117(a)(1), HHSC changed the word "subchapter" in the proposal to "chapter" in the adopted rule.

Legal Authority

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority and §531.02444, which requires HHSC to implement a Medicaid buy-in program for children with disabilities; and the Human Resources Code, §32.021 and Texas Government Code, §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§361.107. Nonfinancial Requirements.

(a) Citizenship, immigration status, and residency. To be eligible for MBIC, a child must meet the citizenship, immigration status, and residency requirements in Chapter 358, Subchapter B of this title (relating to Nonfinancial Requirements).

(b) Disability. To be eligible for MBIC, a child must meet the Supplemental Security Income program's definition of disability for children, as explained in 20 CFR §416.906.

(c) Age. A child is eligible for MBIC through the month of his or her 19th birthday, if the child meets all other eligibility criteria.

(d) Marital status. To be eligible for MBIC, a child must not be married.

(e) Living arrangement.

(1) An applicant or recipient must not reside in a public institution, including a jail, prison, reformatory, or other correctional or holding facility, as defined in 42 CFR §435.1009 and §435.1010.

(2) If a recipient enters a nursing facility or intermediate care facility for persons with mental retardation, HHSC does not process the denial of MBIC Medicaid until eligibility for the appropriate institutional Medicaid program is determined.

(f) Social security number. In accordance with 42 CFR §435.910, a child or the child's authorized representative must give the child's social security number to HHSC as a condition of eligibility for MBIC.

(g) Application for other benefits. To be eligible for MBIC, a child or the child's authorized representative must apply for and obtain, if eligible, all other benefits to which the child may be entitled, in accordance with 42 U.S.C. §1382(e)(2).

§361.117. Notice of Eligibility Determination and Right to Appeal.

(a) After making an eligibility determination on an initial application, HHSC sends the applicant:

(1) a written notice of eligibility, including notice of any monthly premium requirements and the medical effective date described in §361.119 of this chapter (relating to Medical Effective Date); or

(2) a written notice of ineligibility and the reason for the decision.

(b) After making an eligibility determination or redetermination, HHSC sends the recipient a written notice of any change in eligibility or monthly premium requirement.

(c) The written notice informs the applicant or recipient of the right to request a hearing to appeal HHSC's decision. The hearing is held in accordance with 42 CFR Part 431, Subpart E and HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.1

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Subchapter A, §1.1, concerning Definitions for Housing Program Activities. Section 1.1 is adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8560).

The new section is adopted in order to create a centralized rule with definitions that could be applicable to other departmental multifamily programs.

The Department accepted comments to the proposed rule in writing and by email. This document provides the Department's response to all comments received. Comments and responses are presented in the order they appear in the rules. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment. If comment resulted in recommended language changes to the Draft Definitions for Housing Program Activities as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 23, 2010 with comments received from (6) Debra Guerrero, NRP Group, (7) Diana McIver, TAAHP, (9) Barry Kahn, (10) Bill Fisher, Odyssey Residential, (21) Bobby Bowling IV, Tropicana Building Corporation (24) Marilyn Harman, National Alliance on Mental Illness Austin (NAMI), (25) Belinda Carlton, Texas Council for Developmental Disabilities, and (28) Cynthia Bast, Locke Lord Bissell & Liddell.

REASONED RESPONSE TO PUBLIC COMMENT ON THE PROPOSED ADOPTION OF 10 TAC CHAPTER 1, SUBCHAPTER A, §1.1, DEFINITIONS FOR HOUSING PROGRAM ACTIVITIES.

§1.1(1) - Definitions - Adaptive Reuse (28)

COMMENT SUMMARY: Commenter (28) suggested including "hotels" in parenthetical citing hotels are prime candidates for adaptive reuse and often require confirmation whether hotels are considered non-residential.

STAFF RESPONSE: The inclusion of this additional potential non-residential building type in the example parenthetical does not change in any way the meaning of the definition and therefore staff recommends making the change for clarifying purposes.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(6) - Definitions - Appropriate Local Official (7), (9)

COMMENT SUMMARY: Commenter (7) suggested clarification to this definition so that if a development is located within an ETJ but does not have Council Representation, then the appropriate local official would be the County official. Additionally, Commenter (9) suggested that the references to ETJ within the definition be removed so that the city controls developments within the city limits and the county controls developments that are in the county.

STAFF RESPONSE: The Appropriate Local Official depends upon the location of the site with regards to the ETJ and depends upon the notice or specific requirement in the QAP for which the Appropriate Local Official is identified. In some cases, the municipal control over the ETJ is relevant to the QAP requirement, and in other cases the municipal control over the ETJ is less relevant and the county jurisdiction may be more relevant. This definition should provide the flexibility to assume the municipal authority over the ETJ except where specifically designated otherwise in the QAP. Staff recommended adding clarifying language that with respect to a municipality or area within an ETJ "where applicable" in determining who the Appropriate Local Official would be.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(11) Definitions - Control (28)

COMMENT SUMMARY: Commenter suggested that the definition of Control should be consistent with the definition of Principal to avoid confusion as they are applied. The definition of Control indicates that Controlling entities are general partners but not investor limited partners. Special limited partners are not referenced in this definition at all; however, they are referenced in the definition of Principal.

STAFF RESPONSE: Staff agreed that including special limited partners as a controlling entity may clarify this definition as special limited partners generally have the ability under certain circumstances to control a development. However, special limited partners might not be in a direct control position at all phases

of the development. They are considered Principals because of their ability to control the development under certain circumstances. Staff recommended adding "special limited partners when applicable" to the definition for clarifying purposes.

BOARD RESPONSE: Accepted Staff's Recommendation.

§1.1(15) - Definitions - Development Owner (28)

COMMENT SUMMARY: Commenter (28) suggested removing the reference to a "General Partner" because that concept is already incorporated in the word "Affiliate."

STAFF RESPONSE: Staff believes that the General Partner role is such a critical one that it is worthy of specifically calling out in the definition of Development Owner. Additionally, the reference to "General Partner" was removed from the definition of Affiliate in the initial draft. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(17) - Definitions - Efficiency Unit (21)

COMMENT SUMMARY: Commenter suggested that the definition be more detailed and indicate that Efficiency Units include usable kitchen features.

STAFF RESPONSE: The proposed definition for Efficiency Unit states that it is "a Unit without a separately enclosed bedroom." The definition uses the term "Unit" which is defined in §2306.6702 of the Texas Government Code, and states that it "contains complete physical facilities for living, sleeping, eating, cooking and sanitation." Therefore, an Efficiency Unit would include usable kitchen features. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(22) - Definitions - Governmental Entity (28)

COMMENT SUMMARY: Commenter suggested adding "local" agencies to the definition.

STAFF RESPONSE: Staff agreed with the proposed clarification.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(23) - Definitions - Governmental Instrumentality (7), (21)

COMMENT SUMMARY: Commenter (7) suggested adding "such as a housing authority of a city or county, a housing finance corporation, or a municipal utility, or a tribal designated housing entity" to the definition. Commenter (21) suggested that this definition requires clarification on whether or not a Governmental Instrumentality can be authorized to transact business for "any" Unit of General Local Government or only for "the" Unit of General Local Government that created the Government Instrumentality.

STAFF RESPONSE: Staff believes there are important distinctions that need to be made with regards to this definition. In stating that the legal entity is created by "a" Unit of General Local Government implies that the Government Instrumentality is a free-roaming instrumentality that received authority from any Unit of General Local Government and not necessarily the Unit of Local General Local Government that has authority over the site regarding a specific application. The Department's intent behind the definition is that City (X) in which the Development is located would approve and authorize the use of funds by the Government Instrumentality. This does not preclude City (Y) from providing funds for the Development in City (X); however, they must have clear authorization from City (X) as evidenced through, for example, an Interlocal Agreement. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation

§1.1(38) - Definitions - Persons with Disabilities (9), (24), (25)

COMMENT SUMMARY: Commenter (9) suggested that this definition has been narrowed quite a bit and that there seems to be some ambiguity and some difficulty with those who are managing properties being able to determine whether somebody fits the much narrower definition. Commenter (9) suggested that the definition revert to the 2010 QAP language. Commenter (25) suggested removing Part C under the proposed definition which states "to include persons with severe mental illness and persons with substance abuse disorders" citing that in doing so the definition of disability would then be consistent with federal and state law. Commenter (24) applauds this definition to include persons with severe mental illness and persons with substance abuse disorders; however, suggests the Department define what "major life activities" include.

STAFF RESPONSE: This definition was adopted by the Housing and Health Services Coordination Council and published in their 2010-2011 Biennial Plan, submitted to the Governor and the Legislative Budget Board on September 1, 2010. This definition was adopted by the Council who represents a broad spectrum of state agencies that work with persons with disabilities and advocates for persons with disabilities. The plan was released for public comment and did not receive any comments on this definition. Staff recommended no changes based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(39) - Definitions - Principal (28)

COMMENT SUMMARY: Commenter suggested that the Department's intent behind the definition is to capture someone who has control over an enterprise and that the definition, as drafted, goes beyond that concept. Commenter suggested adding "other than Special Limited Partners created by a partner providing tax credit syndication equity) and individuals Controlling such General Partners and Special Limited Partners" to the Partnerships section of the definition and adding "and any individual Controlling stock holder" to the Corporations section of the definition and adding "any individual Controlling such members" to the limited liability companies section of the definition. Commenter explained that in partnerships it's important to distinguish between the two types of special limited partner - an affiliate of the developer or guarantor who takes an ownership position in the partnership versus the special limited partner created by the tax credit syndicator. Since tax credit syndicators are excluded for purposes of the credit cap, then the commenter suggests the Department intends to exclude them from the definition of Principal as well. Additionally, with regards to partnerships, commenter suggests not using the defined term as part of the definition itself and that given what the commenter believes the Department is trying to capture it would be more appropriate to refer to "individuals controlling the entity." Commenter suggested that such change would need to be made in the corporations and limited liability companies section of the definition as well.

STAFF RESPONSE: Staff appreciates this comment and refers to the response on the definition of Control to explain the situation with special limited partners. Staff believes that no change to this part of the definition is warranted. Staff agreed with the clari-

fication adding "and any individual Controlling such stock holder" to the Corporations section of the definition and "any individual Controlling such members" to the limited liability companies section of the definition.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(43) - Definitions - Reconstruction (6), (10), (28)

COMMENT SUMMARY: Commenter (10) suggested revising the definition as proposed in the draft so that constructing additional units than what originally existed should not be precluded stating that in certain regions of the state new units are necessary. Commenter (6) and (28) asked for clarification on whether it is the Department's intent to require the exact same number of units that are being demolished be reconstructed and Commenter (28) stated that there could be numerous situations where this would be infeasible. Commenter (6) also suggested that in many instances neighborhoods and cities would prefer reducing the density of an existing development and proposes adding clarification that Reconstruction can include an equal number or less to the definition.

STAFF RESPONSE: Staff believes that the increase in the number of units on an existing site is currently allowed as New Construction but would not be Reconstruction because the additional units are not being reconstructed but rather constructed for the first time. Staff concurs that the construction of any number of units up to the original number of units would be Reconstruction and recommended the change for clarification.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(51) - Definitions - Third Party (28)

COMMENT SUMMARY: Commenter suggested that the definition should exclude service providers such as accountants or lawyers who receive fees from the Development as part of their services and recommended adding the consultants to the definition as well as making those in addition to not receiving any portion of the fees from the Development.

STAFF RESPONSE: Staff believes that a Consultant could be a third party where they are not an Affiliate and not receiving a portion of the development fee. For example an architect, attorney, accountant or appraiser with no control over the applicant and where they have a professional obligation via a license or registration to abide by a code of ethics would be considered a Third Party. Broadening this definition to include any Consultant would confuse the issue since the definition of Consultant includes any person with or without ownership interest in the development. However, staff recommended the definition be changed to clarify that a third party would also not be anyone receiving any portion of the Developer fees from the Department.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(52) - Definitions - Total Housing Development Cost (7), (9)

COMMENT SUMMARY: Commenter (7) suggested that this definition be clarified to ensure that lease-up costs until "breakeven" and required operating reserves are included as part of the Total Housing Development Cost. Additionally, Commenter (9) suggested adding "achieving breakeven and meeting all financing requirements."

STAFF RESPONSE: Staff recommended additional language that includes fees incurred through lease-up to the definition.

BOARD RESPONSE: Accepted staff's recommendation.

§1.1(54) - Definitions - Unit of General Local Government (7), (21)

COMMENT SUMMARY: Commenter (7) suggested that this definition needs to be clarified to include language that a Unit of General Local Government may act through a Government Instrumentality. Commenter (21) requested clarification regarding the Department's intent behind proposing to change the definition from Local Political Subdivision to Unit of General Local Government. Commenter (21) stated that if the Department wishes to include or exclude different entities from the old Local Political Subdivision term then the commenter asks that the definition directly reflect these changes in the language. If the intent is to interpret the same entities as being eligible under this new definition and does not intend to make any substantive changes, then the commenter questions the need to change the definition at all and requests the old term, Local Political Subdivision, be reinstated.

STAFF RESPONSE: Staff believes that a Unit of General Local Government is entitled by law to act through an instrumentality it creates. Including such a reference in the definition confuses the definition, in that the instrumentality could be confused for the Unit of General Local Government itself. Staff also believes that the term Local Political Subdivision could more broadly be confused to include any taxing district whose Governing Board is elected. Staff has historically found that the Local Political Subdivision reference has been limited to municipalities and counties and not, for example, school districts. The term Unit of General Local Government more accurately describes the intent and practical use of this term. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

The Board approved the final order adopting the new sections on November 10, 2010.

The new section is adopted pursuant to the authority of Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§1.1. Definitions for Housing Program Activities.

The following definitions apply to the Housing Tax Credit Program, Multifamily Housing Revenue Bond Program, and other Department programs as defined in this title. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Texas Government Code, Chapter 2306, §42 of the Internal Revenue Code, this section, and repeated in the Tax Credit (Procedures) Manual.

(1) Adaptive Reuse--The change-in-use of an existing non-residential building (e.g., school, warehouse, office, hospital, hotel, etc.), into a residential building. Adaptive reuse does not include the demolition of the external walls of the existing building. All units must be contained within the original exterior walls of the existing building. Porches and patios may protrude beyond the exterior walls. Ancillary non-residential buildings, such as a clubhouse, leasing office and/or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site.

(2) Administrative Deficiencies--Information requested by the Department that is required to clarify or correct inconsistencies in an Application that in the Department's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, coopera-

tive or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person or Principal. All entities that share a Principal are Affiliates.

(4) Applicant--Any Person or Affiliate of a Person who files a pre-application or an Application with the Department requesting a Housing Credit Allocation. (§2306.6702)

(5) Application--A request for funds, housing tax credits or other financial assistance submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material. (§2306.6702)

(6) Appropriate Local Official--With respect to a municipality or area within an extraterritorial jurisdiction (ETJ), where applicable, means either the mayor, the city manager, or another official of the body operating under valid, written confirmation of authority signed by the mayor or city manager. With respect to an area not within the municipality or its ETJ, Appropriate Local Official means a county commissioner or another official authorized by the county commissioner to act.

(7) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; is self contained with a door (or the Unit contains a second level sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a bedroom and meets this definition is considered a bedroom.

(8) Board--The Governing Board of the Department.

(9) Colonia--A geographic area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Texas Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Department.

(10) Commitment--A legally binding written contract, setting forth the terms and conditions under which housing tax credits, loans, grants or other sources of funds or financial assistance will be made available.

(11) Control (including the terms "Controlling," "Controlled by," and/or "under common Control with")--The power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Controlling entities of a partnership include the general partners, special limited partners when applicable, but not investor limited partners. Controlling entities of a limited liability company include the managing members, and any members with 10% or more ownership of the limited liability company, and any members with authority similar to that of a general partner in a limited partnership. Multiple Persons may be deemed to simultaneously have control.

(12) Department--The Texas Department of Housing and Community Affairs or any successor agency.

(13) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(14) Development Consultant or Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(15) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department. (§2306.6702)

(16) Development Team--All Persons or Affiliates thereof that play a role in the Development, construction, Rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(17) Efficiency Unit--A Unit without a separately enclosed bedroom.

(18) Executive Award and Review Advisory Committee ("The Committee")--The Department committee created under Texas Government Code, §2306.112.

(19) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(20) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(21) Governing Body--The elected or appointed body of public or tribal officials, responsible for the enactment, implementation and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(22) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(23) Governmental Instrumentality--A legal entity which is created by a Unit of General Local Government under statutory authority and which instrumentality is authorized to transact business for the Unit of General Local Government.

(24) Grant--Financial assistance that is awarded in the form of money to a housing sponsor for a specific purpose and that is not required to be repaid. A Grant includes a forgivable loan.

(25) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

(26) Historically Underutilized Businesses (HUB)--A business that is a Corporation, Sole Proprietorship, Partnership, or Joint Venture in which at least 51% of the business is owned, operated, and actively controlled and managed by a minority or woman in which the owner(s):

(A) have a proportionate interest and demonstrate active participation in the control, operation, and management of the entities' affairs; and

(B) are economically disadvantaged because of their identification as members of the following groups:

(i) Black Americans--Includes persons having origins in any of the Black racial groups of Africa;

(ii) Hispanic Americans--Includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) American Women--Includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;

(iv) Asian Pacific Americans--Includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal; and

(v) Native Americans--Includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; and

(C) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons described by subparagraphs (A) and (B) of this paragraph; or

(D) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraphs (A) and (B) of this paragraph; or

(E) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned by one or more persons who are described by subparagraphs (A) and (B) of this paragraph; or

(F) a joint venture in which each entity in the joint venture is a HUB under this subdivision; or

(G) a supplier contract between a HUB under this subdivision and a prime contractor/vendor under which the HUB is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies; or

(H) a business other than described in subparagraphs (D), (F), and (G) of this paragraph, which is formed for the purpose of making a profit and is otherwise a legally recognized business organization under the laws of the State of Texas, provided that at least 51% of the assets and 51% of any classes of stock and equitable securities are owned by one or more persons described by subparagraphs (A) and (B) of this paragraph.

(27) HUD--The United States Department of Housing and Urban Development, or its successor.

(28) IRS--The Internal Revenue Service, or its successor.

(29) Land Use Restriction Agreement or LURA--An agreement between the Department and the Development Owner which is a binding covenant upon the Development Owner's successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds.

(30) Low Income Unit--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department.

(31) Managing General Partner--A general partner of a partnership that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also be used for a Managing Member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(32) Material Deficiency--Any individual Application deficiency or group of Administrative Deficiencies which, if addressed, would require, in the Department's reasonable judgment, a substantial reassessment or re-evaluation of the Application or which, are so numerous and pervasive that they indicate a failure by the Applicant to submit a substantively complete and accurate Application.

(33) Material Noncompliance--Defined as:

(A) a Housing Tax Credit (HTC) Development located within the state of Texas will be classified by the Department as being in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds a threshold of 30 points in accordance with the Material Noncompliance provisions, methodology, and point system in §60.121 of this title (relating to Notices to the Internal Revenue Service (HTC Properties));

(B) non-HTC Developments monitored by the Department with 1 - 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non-HTC Developments monitored by the Department with 51 - 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 50 points. Non-HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 80 points;

(C) for all programs, a Development will be in Material Noncompliance if the noncompliance is stated in §60.121 of this title, to be Material Noncompliance.

(34) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (§2306.6734)

(35) Net Rentable Area (NRA)--The unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a unit or to the middle of walls in common with other units. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(36) New Construction--Any construction of a Development or a portion of a Development that does not meet the definition of Rehabilitation.

(37) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Per-

sons acting in concert toward a common goal, including the individual members of the group.

(38) Persons with Disabilities--With respect to an individual:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(39) Principal--The term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) partnerships, Principals include all General Partners, special limited partners, and Principals with ownership interest;

(B) corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a 10% or more interest in the corporation and any individual Controlling such stock holder; and

(C) limited liability companies, Principals include all managing members, members having a 10% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company.

(40) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(41) Qualified Allocation Plan--A plan adopted by the Board under this subchapter that:

(A) provides the threshold, scoring, and underwriting criteria based on housing priorities of the department that are appropriate to local conditions;

(B) consistent with §2306.6710(e) of the Texas Government Code, gives preference in housing tax credit allocations to developments that, as compared to the other developments:

(i) when practicable and feasible based on documented, committed, and available Third Party funding sources, serve the lowest income tenants per housing tax credit; and

(ii) produce for the longest economically feasible period the greatest number of high quality units committed to remaining affordable to any tenants who are income-eligible under the low income housing tax credit program; and

(C) provides a procedure for the Department, the Department's agent, or another private contractor of the Department to use in monitoring compliance with the Qualified Allocation Plan and this subchapter.

(42) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act, and

(A) provided under any state or federal program that the HUD Secretary determines is specifically designed and operated to assist elderly persons (as defined in the state or federal program); or

(B) is intended for, and solely occupied by, individuals sixty-two (62) years of age or older; or

(C) is intended and operated for occupancy by at least one individual fifty-five (55) years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is fifty-five (55) years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals fifty-five (55) years of age or older. (42 U.S.C. §3607(b))

(43) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the reconstruction of an equal number of Units or less on the Development Site.

(44) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of a Development on the Development Site, but does not include Adaptive Reuse (§2306.004(26-a)). More specifically, Rehabilitation is the repair, refurbishment and/or replacement of existing mechanical and structural components, fixtures and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible and may include the addition of: energy efficient components and appliances, life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(45) Related Party--As defined, (§2306.6702)

(A) the following individuals or entities:

(i) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573 of the Texas Government Code;

(ii) a person and a corporation, if the person owns more than 50% of the outstanding stock of the corporation;

(iii) two or more corporations that are connected through stock ownership with a common parent possessing more than 50% of:

(I) the total combined voting power of all classes of stock of each of the corporations that can vote;

(II) the total value of shares of all classes of stock of each of the corporations; or

(III) the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) a grantor and fiduciary of any trust;

(v) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) a fiduciary of a trust and a beneficiary of the trust;

(vii) a fiduciary of a trust and a corporation if more than 50% of the outstanding stock of the corporation is owned by or for:

(I) the trust; or

(II) a person who is a grantor of the trust;

(viii) a person or organization and an organization that is tax-exempt under §501(a) of the Code, and that is controlled by that person or the person's family members or by that organization;

(ix) a corporation and a partnership or joint venture if the same persons own more than:

(I) fifty percent of the outstanding stock of the corporation; and

(II) fifty percent of the capital interest or the profits' interest in the partnership or joint venture;

(x) an S corporation and another S corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xi) an S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xii) a partnership and a person or organization owning more than 50% of the capital interest or the profits' interest in that partnership; or

(xiii) two partnerships, if the same person or organization owns more than 50% of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(46) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(C) in an area that is eligible for funding by Texas Rural Development Office of the United States Department of Agriculture (TRDO-USDA), other than an area that is located in a municipality with a population of more than 50,000. (§2306.004)

(47) Selection Criteria--Criteria used to determine funding priorities of the State under the specific housing program as defined in the rules or funding notices of that program.

(48) Single Room Occupancy (SRO)--An Efficiency Unit that meets all the requirements of a Unit except that it may be rented on a month-to-month basis.

(49) Site Control--Ownership or a current contract that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the owner, to require conveyance to the Applicant.

(50) Texas Department of Rural Affairs (TDRA)--As established by Chapter 487 of the Texas Government Code.

(51) Third Party--A Third Party is a Person who is not:

(A) an Applicant, General Partner, Developer, or General Contractor; or

(B) an Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) anyone receiving any portion of the Developer fees from the Development.

(52) Total Housing Development Cost--The sum total of the Acquisition Cost, Hard Costs, Soft Costs, Developer Fee and Contractor Fee incurred or to be incurred through lease-up by the Development Owner in the acquisition, construction, rehabilitation and financing of the Development.

(53) TRDO-USDA--Texas Rural Development Office (TRDO) of the U.S. Department of Agriculture (USDA) serving the State of Texas.

(54) Unit of General Local Government--A city, town, county, village, tribal reservation or other general purpose political subdivision of the State.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007038
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 2, 2011
Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

CHAPTER 35. 2009 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.10

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 35, §§35.1 - 35.10, concerning 2009 Multifamily Housing Revenue Bond Rules, without changes to the proposal as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8584) and will not be republished.

The repeal is adopted in order to enact new sections.

Public hearings on the repeal were held in Dallas, Houston, El Paso, Brownsville, Midland, and Austin. Additionally, written comments on the proposed repeal were accepted by mail, email, and facsimile through October 23, 2010.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on November 10, 2010.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

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CHAPTER 35. 2011 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.9

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 35, §§35.1 - 35.9, concerning the 2011 Multifamily Housing Revenue Bond Rules, without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8585) and will not be republished.

The new sections are adopted in order to implement changes that will improve the 2011 Private Activity Bond Program.

The Department accepted comments to the proposed rules in writing and by email.

No comments were received regarding the new sections.

The Board approved the final order adopting the new sections on November 10, 2010.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

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CHAPTER 49. 2009 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.23

The Texas Department of Housing and Community Affairs (Department) adopts the repeal of 10 TAC Chapter 49, §§49.1 - 49.23, concerning 2009 Housing Tax Credit Program Qualified Allocation Plan and Rules, without changes to the proposal as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8592) and will not be republished.

The repeal is adopted in order to enact new sections.

Public hearings on the repeal were held in Dallas, Houston, El Paso, Brownsville, Midland, and Austin. Additionally, written comments on the proposed repeal were accepted by mail, e-mail, and facsimile through October 23, 2010.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on November 10, 2010.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

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CHAPTER 49. 2011 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.17

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 49, §§49.1 - 49.17, concerning the 2011 Housing Tax Credit Program Qualified Allocation Plan and Rules. Sections 49.3 - 49.9, 49.11 and 49.13 are adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8593). Sections 49.1, 49.2, 49.10, 49.12, and 49.14 - 49.17 are adopted without change and will not be republished.

The new sections are adopted in order to implement changes that will improve the 2011 Housing Tax Credit Program.

The Department accepted comments to the proposed rule in writing and by email. This document provides the Department's response to all comments received. Comments and responses are presented in the order they appear in the rules.

Public comments were accepted through October 23, 2010 with comments received from (1) Joe Chamy, Chamy Investments, (2) S. Anderson Consulting and S2A Development Consulting, (3) Donna Rickenbacker, Marque Real Estate Consultants, (4) Hal Fairbanks, HRI Properties, (5) Rafael Anchia, State Representative, District 103, (6) Debra Guerrero, NRP Group, (7) Diana McIver, TAAHP, (8) Ben E. Brewer III, Downtown Alliance San Antonio, (9) Barry Kahn, (10) Bill Fisher, Odyssey Residential, (11) Ben Medina, City of Brownsville, (12) Darrell G. Jack, Apartment MarketData, LLC, (13) Barry Halla, Life Rebuilders, (14) Sara Andre, (15) Robert H. (Bob) Sherman, SBG Development Services, L.P, (16) Rollette Schreckenghost, San Antonio Conservation Society, (17) Albert E. Magill, III San Jacinto Realty Services, LLC, (18) Terry Coyne, Community Preservation Partners, (19) Jerry Madden, State Representative, District 67, (20) Michael Bodaken, National Housing Trust, (21) Bobby Bowling IV, Tropicana Building Corporation, (22) Veronica Gonzales, State Representative, District 41, (23) Andrew M. Taft, Downtown Fort Worth, Inc., (24) Marilyn Hartman, National Alliance on

Mental Illness Austin (NAMI), (25) Belinda Carlton, Texas Council for Developmental Disabilities, (26) Bryan Hughes, State Representative, District 5, (27) Jean Latsha, National Farm Workers Service Center, Inc. (28) Cynthia Bast, Locke Lord Bissell & Liddell, (29) Barry Palmer, Coats Rose, (30) Texas Supportive Housing Coalition, (31) Charlie F. Howard, State Representative, District 26, (32) John Henneberger, Texas Low Income Housing Information Service, (33) J. Anthony Sisk, Churchill Residential, (34) Barbara Holston, Fort Worth Housing Authority, (35) Kathy Tyler, Motivation, Education & Training, Inc. (MET), (36) Ken Paxton, State Representative, District 70, (37) Edmund Kuempel, State Representative, District 44, (38) Colby Denison, Denison Development and Construction.

The comments and responses include both administrative clarifications and corrections to the Qualified Allocation Plan (QAP) recommended by staff and substantive comments on the QAP and the corresponding Departmental and Board responses. Comments and responses are presented in the order they appear in the QAP. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment. If comment resulted in recommended language changes to the Draft QAP as presented to the Board in September, such changes are indicated.

REASONED RESPONSE TO PUBLIC COMMENT ON THE PROPOSED ADOPTION OF 10 TAC CHAPTER 49, 2011 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

Chapter 49 - General - No specific part of the QAP referenced in comment (10)

COMMENT SUMMARY: Commenter suggested that preference be given in the QAP to affordable housing developments that pay property taxes over those that are property tax-exempt.

STAFF RESPONSE: Staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment; therefore, staff does not recommend any changes. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

Chapter 49 - General - No specific part of the QAP referenced in comment (20)

COMMENT SUMMARY: Commenter encouraged the Department to target Weatherization Assistance Program funds for use in existing affordable housing pursuing tax credits and suggested the low income families and seniors in multifamily housing have an opportunity to benefit from weatherization investments.

STAFF RESPONSE: Weatherization Assistance Program funds are utilized on a unit-by-unit cost effective basis rather than Development-wide. Weatherization funds are intended to assist development on a single family level rather than multifamily Developments. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

Chapter 49 - General - No specific part of the QAP referenced in comment (10)

COMMENT SUMMARY: Commenter suggested that the Board have clear and broad authority to waive any rule or any staff recommendation for good cause in regard to anything involving the QAP.

STAFF RESPONSE: Staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment; therefore, staff does not recommend any changes. It should be noted that there are some provisions in the 2011 QAP that are statutorily mandated and therefore, do not allow the Board the ability to waive. Moreover, there are applicable sections in the QAP that allow, for good cause, the Executive Director to waive. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.2 - Definitions - Intergenerational Housing (3), (32)

COMMENT SUMMARY: Commenters (3), (32) suggested the Board reconsider removing this development option from consideration. Commenter (3) suggested that Intergenerational Housing is a viable alternative development type that has social benefits to the residents. The inclusion of these age groups supports family cohesiveness in instances where seniors want to live close to their families. It also improves the feasibility of the operations of the senior component and likelihood of providing housing to seniors in markets with low rents. Commenter (32) suggested that there are too many senior applications submitted and approved relative to family Development and stated that in 2009, 40% of the regionally allocated developments funded were Qualified Elderly Developments and that according to data provided by the Texas State Data center, in 2007 only 12% of the Texas population was 62 or older. Commenter (32) suggested that the Department's policy should be to encourage Intergenerational Developments and that to accomplish this incentives for elderly segregated housing in the QAP should be reduced, perhaps by awarding points directly to intergenerational or family housing.

STAFF RESPONSE: While the definition for Intergenerational Housing and related provisions has been removed from the QAP the Department will still accept such applications and evaluate based on the Department's Intergenerational Housing Policy. The Policy was established by the Board to neither encourage nor discourage Intergenerational housing per se, but only to provide guidance on how they may exist and remain eligible for funding. Staff believes incentivizing this Development type will, among other things, lead to a less efficient allocation of credit because of the duplication of common areas, leasing activity and smaller Development size for each independent sub-Development in an Intergenerational Development. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.2 - Definitions - Qualified Nonprofit Development (13)

COMMENT SUMMARY: Commenter suggested that the definition for Qualified Nonprofit Development only mentions that the nonprofit must materially participate in the Development and does not state anything about control; whereas the nonprofit set-aside requires the nonprofit be in control and materially participate. Commenter requested clarification on the conflicting language.

STAFF RESPONSE: The definition for a Qualified Nonprofit Development states that the Development must include a Qualified Nonprofit Organization which states the nonprofit must exercise control pursuant to §2306.6706. Therefore, to be eligible for the

set-aside the nonprofit must have control of the Development in question. The IRS does not require the nonprofit to exercise control in order to be identified as a Qualified Nonprofit Development for purposes of identification on the IRS Form 8609. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(a)(9) - Ineligible Applicants (28)

COMMENT SUMMARY: Commenter suggested that this section requires clarification regarding the parties to whom this provision applies. Specifically, the opening paragraph of this section states that it applies to any Applicant, Development Owner, Developer or Guarantor. Then, in paragraph (9) reference is made to any Developer or Principal of the Applicant. Commenter suggested that paragraph (9) be separated as its own section rather than incorporating it into a larger section on ineligibility with different impacted parties. Commenter also suggested language be added to indicate whether litigation has been instituted and is continuing at the time of Application.

STAFF RESPONSE: For consistency with the heading of the section on Ineligible Applicants, staff recommended paragraph (9) be revised to reflect that an Applicant is ineligible if any Applicant, Development Owner, Developer or Guarantor involved with the Application. In addition, staff agreed with Commenter on adding language to indicate whether litigation has been instituted and is continuing at the time of Application.

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(a)(9) - Ineligible Applicants (7), (10), (17), (29)

COMMENT SUMMARY: Commenter (7) suggested that this paragraph be revised in order to provide a more "date certain" timeframe by which Applicants would have been voluntarily or involuntarily removed by a lender or equity provider. Commenter (7) recommended the timeframe be during the previous five (5) years. In addition, Commenter (7) suggested the language be clarified to only apply to situations where the person was acting as a Principal in the transaction where the removal occurred and that the transaction involved residential real estate. Commenter (28) also suggested the timeframe be limited to removals within the past five years and further suggested an investigation should only be conducted for removals that occurred during a tax credit compliance period. Commenter (28) suggested that only affordable properties should be applicable citing market rate properties as an entirely different kind of real estate and prior experience with market rate properties may not be relevant to performance with regard to affordable properties. Additionally, Commenter (28) suggested that the investigation for removal issues should only consider properties in Texas since it would be more difficult for the Department to investigate a removal in another state because the Department does not have relevant knowledge of markets and other conditions in that state. Commenter (28) suggested the term "promptly notified" is vague and recommended the Department structure the requirement in such a way that requires the Applicant to submit a certification at the time of the Application that these conditions exist or not. If there is any change in the accuracy of that certification the Applicant should then be required to notify the Department similar to how they are currently required to notify the Department of any other changes in its Application. Commenter (28) recommended considering the compliance history of the Development during the time of the Developer's or Principal's involvement as one other factor in the investigation. Commenter (28) believed it would be helpful to cross-reference the Department's rules regarding the debarment list. Applicants should be able to access one source to explain how referrals for debarment are done, what appeal rights are available and what, if any, consequences are associated with debarment. Commenter (17) suggested inserting language that would only trigger a review by the Department in the instance that the Developer or Principal failed to adhere to a contractual obligation of an Agreement and also suggested that the contributing or causative effect of the circumstances beyond such Developer's or Principal's control be revised to include a natural disaster. Commenter (29) suggested that based on comments made on record by the Board, a voluntary sale of the Developer's interest should not trigger ineligibility to participate in the tax credit program. Therefore, Commenter (29) requested the term "voluntarily" be removed from the provision. Additionally, Commenter (29) suggested language be added that indicates the Executive Director and the Board shall take such circumstances into consideration during the review and suggested language be added that the sale of a developer's interest in the Development does not trigger this provision. Commenter (10) suggested the Board exclude the voluntarily or involuntarily removal provision completely until there are rules in the QAP that address "bad apple" equity providers citing that the circumstances surrounding the removal are all fact-specific and that many of them are done to avoid litigation.

STAFF RESPONSE: Staff agreed that a "date certain" timeframe by which the removal, whether voluntarily or involuntarily, had occurred should be clarified as well as the provision being applicable where the person was acting as a Principal in the transaction where the removal occurred. Staff recommended the following revision which includes the previously revised language regarding the parties affected by the removal as well as disclosure if these parties are involved in litigation surrounding a removal at the time of Application. The paragraph should be revised to read "if any Applicant, Development Owner, Developer or Guarantor involved with the Application has been voluntarily or involuntarily removed from a rent or income restricted multifamily Development by a lender, equity provider, or any other owners or investors as a Principal during the previous ten (10) years, however designated, or any combination thereof or if any litigation to effectuate such removal has been instituted, and is continuing at the time of Application, the Department shall be promptly notified by the Applicant." This revision is consistent with the Department's debarment policy which allows for a ten (10) year prior review regarding performance. Staff believes the Applicant should be required to disclose circumstances of the removal that involved multifamily affordable Developments including whether there was a voluntary sale of the Developer's interest if it was prompted by the lender or investor. Staff will evaluate each circumstance and make recommendations to the Executive Director and the Board. Further comments regarding removal as a result of failure to adhere to a contractual obligation, staff believes these are legalistic and technical in nature and such detail does not need to be specifically mentioned in the QAP. In addition, staff believes that at the time of Application the Applicant would be required to certify that up to that point no removal has occurred. However, should a removal occur after the Application is submitted and prior to the award, the Department would need to be notified. Staff did not object to Commenter (17) suggestion to include "natural disaster" under subparagraph (C) of this paragraph. In addition, staff agreed with Commenter (28) on including the compliance history of the Development during the time of the Applicant's, Development Owner's, Developer's or Guarantor's involvement as another factor in the investigation. In response to Commenter (28), should there be an indi-

vidual listed on the Department's Debarment list, such list would be posted on the Department's website. Additionally, the rules, including the process for debarment can be found in the Department's Debarment Policy in 10 TAC §1.20(g).

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(b)(11) - Ineligible Applications (10), (28), (32)

COMMENT SUMMARY: Commenter (10) supported the language in this section which limits deferred developer fees to 50%. Commenter (28) suggested the location of the limits on deferred developer fees seems inappropriate. Specifically, Commenter (28) stated that this section, which references ineligibility and debarment, does not seem appropriate for testing whether an application has more than 50% of the developer fee is deferred and suggested this test move to the Threshold section. Moreover, Commenter (28) suggested the Applicant would want to appeal the Department's conclusion that more than 50% of the developer fee is deferred. Commenter (28) further suggested this section on Ineligible Applications is confusing because of the use of different defined terms and suggested there should be consistency in the application of ineligibility. Commenter (32) suggested the language in this section threatens unit affordability in order to keep a handful of developers from making a bad financial decision and further suggested the Department address fee deferral regarding financial feasibility through its underwriting.

STAFF RESPONSE: This requirement is intended to serve as a simple measure for the Applicant to determine if they should proceed. Additionally, Developments with higher levels of deferred developer fee are less likely to be syndicated in the current market. While staff agreed with Commenter (28) that debarment should not be the result if more than 50% of the developer fee is deferred, staff does believe that it should warrant the Application ineligible. Staff recommended the beginning of this section be revised to specifically state which items under this section would result in a termination and in addition to a termination which items would result in debarment. As with all other ineligibility items, the Applicant would have the ability to appeal staff's decision in accordance with the Appeals Process outlined therein. In response to Commenter (28) comment regarding the inconsistency in defined terms relating to the ineligibility of an Application, staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment. However, staff believes it would be worth addressing in the 2012 QAP.

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(c)(8) - Ineligible Developments (3), (4), (8), (16), (23), (29), (34)

COMMENT SUMMARY: Commenters (3), (8), (16), (23) suggested that there needs to be flexibility with the maximum unit percentages outlined in this section; specifically if the Applicant is proposing Adaptive Reuse and is constrained by what the building will allow and the type of housing being considered. Commenter (4) suggested in downtown areas there is a high demand for one and to a lesser extent two bedroom units and markedly less demand for three and four bedroom units. Commenters (29), (34) state that as proposed one and two bedroom units cannot be built without having at least 15% of the Development devoted to three or four bedroom units which is not what the market dictates. Commenters (3), (4), (29), (34) suggested that all Developments located in areas locally defined as a Central Business District or a Downtown Development District be considered an exception from the definition of Ineligible Developments as it relates to the maximum unit percentages. Commenter (16) suggested there should be flexibility regarding underutilized buildings, including historic structures that may be converted into housing, thereby creating more opportunities for people to live in historic buildings and experience the charm of Adaptive Reuse conversions. Commenter (23) suggested flexibility regarding the unit maximum percentages will level the playing field for downtown areas and will increase the potential for center city locations to serve the workforce and decrease the transportation costs borne by those workers. In addition, the use of affordable housing tax credits will also help build the financial gap in the renovation of historic structures.

STAFF RESPONSE: While preferences for At-risk Developments exist, the Department has not identified Developments located in Central Business Districts or Downtown Development Districts as a Development priority. Staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment; however, staff believes it would be worth addressing in the 2012 QAP. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(c)(11) - Ineligible Developments (3), (6)

COMMENT SUMMARY: Commenter (3) requests that Adaptive Reuse Developments be exempt from the negative site characteristics that would make a Development ineligible. Adaptive Reuse of a building usually occurs in higher density Urban areas, Urban Cores and Transit Oriented Districts where active railroad tracks, junkyards, and/or industrial uses may be within 300-yards of the proposed site. Commenter (3) stated that Adaptive Reuse supports and enhances a community's efforts to revitalize key Urban areas of their city and potentially serves as a catalyst for removing several negative or unwanted features in these areas. Commenter (6) suggested that the placement of negative features into the section regarding Ineligible Developments is in direct conflict with opportunities to redevelop in the inner city and highly urban areas. Commenter (6) suggested the negative site features should remain as a reduction in the point system and not an automatic prohibition for housing tax credit developments.

STAFF RESPONSE: As previously mentioned, the Department has not identified Adaptive Reuse as a Development priority that would warrant an exemption from the negative site characteristics. Staff maintains that tax credit Developments, regardless of construction type, should not be located adjacent to the negative site characteristics noted in this section. Finally, staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.4(c)(14) - Ineligible Developments (1), (14), (32)

COMMENT SUMMARY: Commenter (1) suggested that the requirement for all Developments to include exhaust/vent fans (vented to the outside) in bathrooms should only be applicable to new construction Developments. For Rehabilitation Developments, installing the exhaust/vent fans can create some construction issues associated with the number of roof penetrations and consequent weakness to the roof system that

are not only excessively expensive but the structural issues that are created might exceed the long term benefit to the Development. Commenter (14) suggested that Rehabilitation Developments may have difficulty with installing ceiling fans. While the Draft QAP allows for deviations for good cause the Commenter (14) requested the Department identify the specific process and clarify exactly what documentation would need to be submitted. Commenter (14) also suggested the Applicant be allowed to submit their request for such a waiver two or three weeks before the applications were due and get a quick turnaround on whether or not the waiver would be granted so that the Applicant can proceed accordingly going forward. Commenter (32) suggested the additional language added as a result of the September Board meeting requiring that there be fire sprinklers in all Units "where required by local code" be removed from the requirement. Commenter stated that the Department has an interest in protecting the lives of the residents of multifamily properties built in the tax credit program wherever the Development is located and further states that extensive data demonstrates that fire-suppression system saves lives.

STAFF RESPONSE: The Draft QAP includes a provision that deviations for good cause by which any of the amenities listed in this section cannot be provided must be approved prior to the award and that the request for such deviation must be submitted in the Application. The reason for this is to ensure that the Developer has identified the need for all required amenities before the Application is approved for funding so that the cost of the amenity is not subsequently a reason to exclude the amenity. The Executive Director may issue such approvals for such deviation with good cause. Should the request lack information staff feels is needed in order to evaluate the request then additional information will be requested from the Applicant. Staff does not believe evaluating a waiver request absent the application would allow for an accurate evaluation. The requirement for Developments to be equipped with fire sprinklers "where required by local code" was intended to address single family Developments where fire sprinklers are not mandated by local code. Further consideration of this amenity may be an area to be addressed with the 2012 QAP. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(b) - Credit Amount (3), (6), (7), (21), (29)

COMMENT SUMMARY: Commenter (3) suggested the removal of the ability to prorate the credit cap based on the partnership between experienced and inexperienced developers in addition to the removal of the ability of a HUB under §49.9(a)(23) to team up with an experienced developer and not have the experienced developer subject to the credit limitation leaves no option under the Draft QAP for expanding opportunities to inexperienced developers. Commenter (3) also suggested this change is contrary to the Board's intention to bring more developers into the program and recommended reverting back to the 2010 QAP language. Commenter (7) suggested that, as structured, the language in this section appears to have conflicting definitions relating to a Guarantor and suggested language be added to state the Guarantor is not a Principal of the Development Owner. In addition, Commenter (7) also recommended reinstatement of the proration of the $2 million cap among Joint Venture Partners citing concern that the Draft QAP removes any proration of the cap as it relates to Capacity Joint Ventures between experienced and inexperienced development partners which limit the ability of inexperienced developers to participate in the Housing Tax Credit program. Commenter (29) similarly stated that many Developments require the financial backing and guarantees of more than one developer and it seems only fair that in such situations the credit cap should not be allocated in whole to both of the developers. Commenter (6) requested clarification on whether the cap will be applied to a Guarantor who is exclusively the General Contractor even if the same entity or affiliate also serves as the Development Consultant and receives the fee allowed under the QAP. Commenter (21) suggested the language in this section be clarified to indicate any forward commitments made from the 2012 Application Round are applied to the credit cap limitation for the 2011 Application Round. Commenter (28) stated that paragraph (5) of this subsection which reads that "...a Person is not deemed to be an Affiliate solely because it... provides or supports the Applicant's financial capacity for the proposed Development" is confusing because it sounds like it would essentially mean a Guarantor. If so, it would be inconsistent with the preceding language in this section which includes the Guarantor in the $2 million cap while paragraph (5) would exclude them.

STAFF RESPONSE: Staff believes the proposed language in the initial draft is more clearly in line with statutory requirements than a proration approach. Staff agreed that the language could be clarified with respect to those Principals that have control over the Development and recommended it be revised to state "unless the Guarantor is also the Contractor and is not a Principal of the Applicant, Developer, Related Party or Affiliate of the Development Owner." Staff made a typographical error on the year in which the forward commitment would count against a Developer for the credit cap and suggested it be revised to indicate forward commitments from the 2012 Credit Ceiling are applied to the credit cap limitation for the 2011 Application Round. In response to Commenter (6) comment, it would depend on the Development consultant's ability to control the Development. Staff believes it would be difficult to have all three roles and not have some control over the Development. In response to Commenter (28) regarding the conflicting language on whether a Guarantor is included in the calculation of the $2 million cap, staff concurred and recommended that paragraph (5) under this subsection be removed.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(c) - Limitations on the Size of Developments (6)

COMMENT SUMMARY: Commenter requested clarification on the due date for resolutions required under this section and suggested they be due on April 1, 2011 which is the same due date for all other resolutions.

STAFF RESPONSE: This section refers to the Resolution Delivery Date as indicated in the Program Calendar under §49.3 which states the resolution is due on April 1, 2011. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(d) - Developments Proposing to Qualify for a 30% Increase in Eligible Basis. (3), (7), (20), (32)

COMMENT SUMMARY: Commenter (3) suggested that given the current state of the Private Activity Bond market, such Applications should have the ability to qualify for the 30% increase in eligible basis in paragraphs (2) and (3) of this subsection. Commenter (3) suggested that allowing the boost for Tax Exempt Bond Applications will allow for the expansion of affordable housing in more affluent areas of the State considered high opportunity areas. Commenters (7), (32) recommend that Devel-

opment location in an Exemplary or Recognized School Attendance Zone be continued as an eligible category for qualifying for the 30% boost in eligible basis; however, Commenter (32) suggested it be revised to exclude magnet schools. Commenter (32) suggested that the criteria for the High Opportunity Area boost for Developments in census tracts with an AMGI that is higher than the AMGI of the county or place is too broad in that almost half of Texans already live in areas meeting the eligibility for this boost. Commenter (32) suggested the language be revised to reflect a Development that is proposed to be located in a census tract in the top quartile (when ranked by AMFI) of tracts in the county in which it is constructed. Commenter (20) suggested the 30% boost be directed towards the preservation of vital at-risk affordable rental properties located in neighborhoods most affected by the current foreclosure crisis or unable to move forward due to the current volatility in the tax credit market. Commenter (20) supports the incentive in the draft QAP for providing affordable housing in areas with access to public transportation which, among other things, ensures that low-income families have good access to jobs and services.

STAFF RESPONSE: The H.R. 3221 legislation did not include 4% and Tax Exempt Bond Applications as eligible for the 30% boost in eligible basis under paragraphs (2) and (3) of this subsection. Staff does not believe there is an eligible basis cost increase associated with the Developments proposed to be located in exemplary or recognized school zones to warrant the boost. The QAP still continues to establish a prioritization in the Selection Criteria for Developments located in these zones and the draft QAP as proposed excludes magnet schools or elementary schools with district-wide possibility of enrollment or no defined attendance zones. While staff appreciates the suggestion requested by Commenter (32) to restructure the 30% boost to the top quartile census tracts or as an alternative making this census tract issue and the census tract with no greater than 10% poverty item necessary to achieve the boost, staff believes this change, similar to Commenter (20), would result in a substantive change that cannot be changed in the proposed 2011 QAP without having been out for public comment in the required timeframe and believes it would be worth addressing in the 2012 QAP. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(b)(3) - Allocation Process - At-Risk Set-aside (18), (20)

COMMENT SUMMARY: Commenter (18) suggested clarification on subparagraph (D) of this paragraph regarding the need for all subsidies on the Development to be "at-risk" in order to qualify under this set-aside. Commenter suggested this may be in conflict with the Department's intent. Commenter (18) provides an example that a Section 236 mortgage note that is eligible for prepayment and a HAP contract that is not up for renewal should not preclude the Development from being considered At-Risk. In addition, Commenter (18) suggested removing all of subparagraph (D) since its reference to "financial benefits" is already sufficiently addressed in subparagraph (A). Commenter (20) supports the Department's 15% set-aside for At-Risk Developments and encourages the Department continue to prioritize applications involving Preservation and Rehabilitation.

STAFF RESPONSE: It is not the Department's intent to require a Development to be at-risk of losing all subsidies available on the Development and staff agreed with Commenter (18) example in qualifying as an At-Risk Development. Staff agreed that subparagraph (D) is confusing and recommended the subparagraph be changed to reflect that "Developments must be at risk of losing affordability from the financial benefits available to the Development and must retain or renew all possible financial benefit, if available, and at least maintain existing affordability to qualify as an At-Risk Development."

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(3) - Rehabilitation Costs per Unit (32)

COMMENT SUMMARY: Commenter stated that a number of tax-exempt bond Developments have failed in recent years that involved the rehabilitation of older Developments because they failed to provide an adequate level of rehabilitation which undermined the long-term viability of the Development. Commenter suggested the $15,000 per unit rehabilitation threshold is too low and should be increased. Commenter stated that the Department should include a list of critical major components of the Development that must be brought to a like new condition and suggested an appraiser working for the Department, independent of the Developer, should objectively and independently assess the proposed rehabilitation needs of the Development. Without true substantial rehabilitation a Development should not be financed with housing tax credits.

STAFF RESPONSE: Staff believes there was insufficient evidence submitted to suggest an alternative amount for rehabilitation costs per unit. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(2)(A) - Governing Body Resolutions - Twice the State Average

COMMENT SUMMARY: Staff notes there was no public comment received regarding this particular item during the public comment period. However, during public comment at the Board meeting, the City of Houston provided testimony regarding the inclusion of an Extra Territorial Jurisdiction (ETJ) for purposes of clarifying the jurisdiction that would need to authorize the resolution for twice the state's average of housing tax credit per capita.

BOARD RESPONSE: The Board voted to return to the 2010 QAP language which includes the ETJ to read "if the Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the Certificate of Reservation is issued by the Texas Bond Review Board) the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must reference this rule and authorize an allocation of Housing Tax Credits for the Development."

§49.8(4) - Experience Certification (3), (13), (15)

COMMENT SUMMARY: Commenter (3) suggested the proposed changes to this section requiring the experienced party to the Application have actual previous participation in the program will exclude qualified and experienced multifamily developers from entering the program. This will further limit the pool of potential developers and tax credit developments and the Commenter (3) requested last year's language be reinstated. Commenter (13) requested clarification on whether the limitation of 200 units is restricted to New Construction or just Rehabilitation. Commenter (15) requested clarification

on whether the Department was increasing the restriction on qualifying for experience and suggested that the requirements were too broad and that the language from the 2010 QAP should be reinstated.

STAFF RESPONSE: Staff believes experience with the same construction type as what's being proposed and with the tax credit program is important in determining one's qualifications. In determining whether a Principal qualifies for experience, the Department will require that the experience under which they are claiming is for the same construction type under which they are proposing whether single family, multifamily, new construction or rehabilitation. The Principal must be able to demonstrate experience in connection with a development with at least 80% as many units as the Units for which the Application is being made or at least 200 units. If at least 200 units can be claimed as experience then the 80% test will not be required to be met. The maximum number of units needed for certification is 200 units regardless of the construction type. To clarify this, staff recommended the sentence be revised to reflect that persons who establish that they have participated in the development of 200 units or more will not be further restricted by size.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(5) - Certifications - Amenities (6)

COMMENT SUMMARY: Commenter suggested selecting points for scattered site Developments has been difficult because of the requirement that each site have the amenity on site in order to receive the required points. Commenter suggested that an allowance be made if an amenity is located on one of the sites but is available for use by all of the scattered site Developments then each site should be allowed to claim the points toward the threshold requirement.

STAFF RESPONSE: Staff does not believe non-contiguous single family scattered sites should be required to meet the threshold test of amenities provided at each of the sites and recommended the change accordingly.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(5)(A)(ii)(XXVI)(-b-)(-9-) - Certifications - Green Building Amenities (13), (20)

COMMENT SUMMARY: Commenter (13) requested clarification on whether the sub-metering of utilities included both electricity and water or just electricity. Commenter (20) supported the Department's inclusion of the green building amenities, healthy building materials and energy efficient design features in the threshold and selection criteria.

STAFF RESPONSE: Staff agreed that clarification is needed and proposes the language be revised to reflect the Applicant can sub-meter for either water or electricity, whichever was not already sub-metered at the time of Application.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(5)(N) - Certifications (27), (32), (35)

COMMENT SUMMARY: Commenters (27), (32), (35) suggested language be added to affirmatively market to farm workers (as defined by USDA) as well as veterans through direct marketing or contracts with veteran's organizations and organizations that serve farm workers.

STAFF RESPONSE: Staff believes this change would likely make some urban Developments ineligible and could result in falsely signing a certification. Moreover, staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(5)(O) - Certifications (9)

COMMENT SUMMARY: Commenter suggested that there needs to be a certain period of time associated with this certification. Commenter suggested the time limit required by Fannie Mae and Freddie Mac is 10 years, but suggested the Department impose a period shorter than 10 years.

STAFF RESPONSE: Staff agreed that there should be a date certain period of time associated with the voluntary or involuntary removal by a lender, equity provider, etc. and has addressed this in the Ineligible Applicant section, recommending a 10 year period of review as previously mentioned.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(9)(B) - Signage Requirement (32)

COMMENT SUMMARY: Commenter supported the proposed change of the required language in the signage requirements stating that it is more neutral than the previous language and represents an improvement over the status quo. However, the Commenter suggested that the signage requirement in the QAP does not appear to be statutorily required and retains the possibility of adversely affecting the state's progress toward affirmatively addressing fair housing. Developments receiving housing tax credit funding should be held to the same notification standards as other residential developments and Commenter suggested any public notice provisions not required by state law should be struck from the QAP.

STAFF RESPONSE: Staff appreciated the comment supporting the proposed change. Staff believes that notice by signage provides a marketing opportunity for the proposed Development. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(14)(A) - (D) - Supplemental Threshold Reports (9), (12), (21), (32)

COMMENT SUMMARY: Commenters (9), (12), (21) suggested that the due date for the third party reports should be changed back to April 1. Commenter (12) indicated that Applicants want to review the list of pre-application scores to see if their application would be competitive before engaging any of the third party reports. Given a deadline of March 1 this would not give the provider enough time to guarantee delivery of the reports. Commenter (12) suggested that market analysts need the additional 30 days beyond the deadline for the Application to ensure any last minute changes to the unit mix and/or rents are incorporated in the final market study. Without this additional time, the Department is likely to see market studies that do not match the Application. In addition, Commenter (12) suggested that HOME funded Applications already have a March 1 deadline for third party reports and are prioritized by Department staff before non-HOME funded Applications; therefore, according to the Commenter (12), third party reports on non-HOME funded Applications do not need to be submitted by March 1. Commenter (32) suggested the QAP should require independent market analyses and appraisals. Since the market analyst is chosen by a party with an interest in the outcome the market analysis is not seen as truly independent by community organizations and lo-

cal elected officials and, similarly with the appraisals, the public may lack confidence in the value provided by that professional. Commenter (32) suggested the Department could pay for the engagement with a fee charged to the developer and cited the Florida Housing Finance Corporation as an example of a state that uses such a system and relies upon it in its housing tax credit underwriting process.

STAFF RESPONSE: Staff recommended the deadline remain March 1 for Environmental Site Assessments, Property Condition Assessments and Appraisals (if applicable) and staff recommended the deadline for the Market Analyses revert to the April 1 deadline as reflected in the 2010 QAP. In response to Commenter (32) suggesting market analyses and appraisals come from independent Third Party providers, staff believes this change, along with proposing a revised fee structure presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment; therefore, staff does not recommend any changes.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a) - Selection Criteria (32)

COMMENT SUMMARY: Commenter suggested the minimum final score threshold be raised 10% from 118 to 130 and that this threshold be applied across all set-asides. At-Risk applications currently have a set-aside of 15% under the statute and in many years, according to the Commenter, the demand for these credits has been less than 15% which results in applications with relatively low scores getting funded in this set-aside because of lack of competition. Commenter further stated that the reason for the At-Risk set-aside should be to preserve high-quality existing housing and preserve the subsidies on those Developments. As a result, the minimum threshold criteria for all Developments, including those in the At-Risk set-aside should include evidence the Development will provide high quality housing to its residents.

STAFF RESPONSE: As proposed, the total of all points available would suggest a maximum score potential of 225. Last year the lowest scoring Application to receive an award scored approximately 65% of last year's maximum. A score of 130 which represents 57% of this year's maximum where a 118 represents 52% of the maximum. Staff concurred and recommended the increase in the minimum score across all applications and set-asides from 118 to 130 points.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(2) - Selection Criteria - Quantifiable Community Participation (7), (11), (30), (32)

COMMENT SUMMARY: Commenter (7) suggested this scoring item be modified to create a separate scoring category in instances where the Applicant can provide supporting documentation that no neighborhood association exists that includes the subject site. Such modification would allow an Application to be eligible for 18 points where a neighborhood organization does not exist which is more points than the situation where a neighborhood organization exists but is neutral but fewer points than where a neighborhood organization exists and supports the Development. Commenter (7) believes such recommendation is consistent with the recent recommendations of the Sunset Committee. Commenter (11) suggested the Department investigate whether there can be different points awarded for new neighborhood associations that are being formed solely for purposes of the tax credit application. Commenter (30) suggested this scoring item requires legislative action that should be supported by the Department and other stakeholders as a result of the following issues: the QAP point system for community support obstructs and often bars the Development of high quality supportive housing, the QAP point system for community support raises serious fair housing issues, and the QAP point system for community support uses a flawed and inaccurate method for gauging local support and interests. Commenter (30) cites the findings in the recent Sunset Advisory Commission Staff Report which indicates the neighborhood support process is flawed and often relies on inaccurate letters and recommended giving points for letters from local governments instead of neighborhood organizations of which the Commenter strongly supports. Commenter (32) suggested scoring all applications with an assumption of support unless a negative letter is received and further suggested instructions for neighborhood associations should include a statement that the Department is under an obligation to affirmatively further fair housing and that letters that urge or demonstrate an act that would result in a prohibited act under fair housing laws will not be considered. In addition, Commenter (32) suggested the State should limit the scoring of negative points to letters which address specific concerns regarding the specific proposed Development at that location, and not concerns regarding the housing tax credit program in general.

STAFF RESPONSE: Staff does not recommend that applications in areas where there is no neighborhood organization should qualify for 18 points. At the September Board meeting, the Board requested the scoring from the 2010 QAP be maintained. Staff acknowledged that there may be inadequacies relating to the scoring and intent behind this scoring item; however, implementing the most significant of such changes would require a statutory change. Furthermore, investigating the extent to which neighborhood associations are formed purely for the purposes of this scoring item would be difficult to ascertain and such a change is considered substantive in nature that cannot be changed in the proposed 2011 QAP without having been out for public comment in the required timeframe. Staff recommended no change based on this comment. However, Staff notes that while the Board recommended the 2010 QAP language be maintained, staff failed to make the correction in the published draft that reflected Applications for which no letters from Neighborhood Organizations are scored will receive a neutral score of 12 points. This section has been updated to reflect the scoring of the 12 points.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(5) - Selection Criteria - Commitment of Funding from a Governmental Instrumentality (7), (11)

COMMENT SUMMARY: Commenter (7) expressed concerns over use of the new terminology - Unit of General Local Government - rather than the terminology of the statute, Local Political Subdivision and suggested changes to these terms as found in 10 TAC §1.1 regarding the Definitions for Housing Program Activities. Commenter (7) also suggested that in this current economic climate where cities and local governments have severe budget issues, it is not reasonable to demand that communities put scarce resources into affordable housing when such projects may be feasible without such additional funding. Commenter (7) suggested the following changes to the funding levels "a total contribution of at least $500 (or $250 for Rural Developments or Developments located in non-participating jurisdictions) per unit receives 12 points; a total contribution of $1,500 (or $750 for Rural Developments or Developments

located in non-participating jurisdictions) per unit receives 15 points; a total contribution equal to or greater than $2,500 (or $1,250 for Rural Developments or Developments located in non-participating jurisdictions) per unit receives 18 points." In addition, Commenter (11) suggested that the Department's underwriting evaluate the need for the soft financing as evidenced in the tax credit application and gap the funds accordingly. In doing so, the Commenter believes the local entity would be able to fund other developments that are not tax credit Developments.

STAFF RESPONSE: Staff does not believe the Board indicated a preference for reducing the funding levels for this scoring item at the September Board meeting. In response to Commenter (11), staff believes the purpose behind its underwriting is to determine the adequate amount of housing tax credits to ensure financial feasibility and gap any excess accordingly. The local entity contributing funds to a Development should develop a similar practice. In response to public comment regarding the change in terms from Local Political Subdivision to Unit of General Local Government and specifically the concern over a housing finance corporation's ability to qualify under this scoring item, staff recommended a change, where applicable, from Unit of General Local Government to Governmental Instrumentality. In addition, staff recommended clarification in subparagraph (A)(ix) in this paragraph regarding a Unit of General Local Government or its designee.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(6) - Selection Criteria - Community Support from State Representative or State Senator (32)

COMMENT SUMMARY: Commenter suggested local elected official input for purposes of awarding points to a tax credit Development should only be considered if the local governing body as a whole provides the input. The Department should develop objective standards that would form the basis of the request for elected official input in addition to requiring that all written comments address how the official's recommendation advances or does not advance the state and local government obligation to affirmatively further fair housing. Commenter stated that language similar to that of the scoring item for Quantifiable Community Participation regarding "input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or scoring of which the Department determines to be contrary to its efforts for affirmatively further fair housing will not be considered" be added to this scoring item.

STAFF RESPONSE: Staff believes the legislature has spent much time contemplating the points for letters from elected officials. While a letter that violates law would be called into question staff believes it would be inappropriate to further expand on this section of the rule because of its extensive legislative history. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(7) - Selection Criteria - The Rent Levels of the Units (2), (3), (29), (32), (33), (38)

COMMENT SUMMARY: Commenter (2) suggested that Developments will have difficulty meeting the 65% expense to income ratio with the additional requirements for deeper income targeting to secure the points under this scoring item. In particular, the Commenter indicates that the Rio Grande Valley, El Paso and rural areas will struggle with this and other deals that would have normally been strong will have substantial gaps, reducing the overall strength of the deal. Commenter suggested that the Department revert back to the 2010 QAP language until extensive research can be performed that details the impact of such a change. Commenter (33) suggested that even though tax credit pricing has increased in the last year, it is still substantially below the levels of four years ago and states many Developments are already in a higher risk profile and without substantial soft financing they will be more difficult to finance and maintain adequate debt service coverage. Commenter (33) suggested that 2011 is not the year to attempt to increase lower rent levels and recommended the 2010 QAP language be reinstated. Commenter (3) suggested that in most non-Major Metropolitan Areas with lower starting rent levels, the economics of the transaction will not work given the proposed changes. In these areas and given the current tax credit pricing the proposed change would result in only active housing authorities or developers that team up with active housing authorities that could apply for the housing voucher to support the income and/or operating expenses would be able to compete in the program. Commenter (3) stated that syndicators are reluctant to structure housing authority developments with HAP vouchers as a source of funding because of the uncertainty if the HUD appropriation to the housing authority changes or is unfunded. Commenter (3) suggested that the Board reinstate the 2010 QAP scoring requirements relating to this scoring item as well as §49.9(a)(3) - Income Levels of the Tenants, specifically for all Development sites located in a county with a population of less than 1,000,000. Commenter (29) suggested that many affordable developments are having difficulties dealing with rising costs and further recommend the 2011 QAP not encourage applicants to limit rents so severely that the fiscal viability of the project is endangered. Commenter (29) suggested reverting to the 2010 QAP language. Commenter (32) suggested the proposed changes to this scoring item represents an incremental improvement and a careful balancing of the competing incentives for gross rent and income targeting and encourages deep targeting of units at residents earning 30% or less of AMFI. Commenter also stated that the Board be discouraged from attempting to re-calculate the optimal relative points on the fly during the November Board meeting. Commenter suggested the Board either adopt this language or revert to the 2010 QAP language. Commenter (38) suggested that with the investor's appetite for risk at an all time low increasing the low income targeting percentages now doesn't make sense. Commenter (38) further suggested that when tax credit pricing returns to where it was five years ago, assuming interest rates remain attractive, that would be the time for increasing low income targeting.

STAFF RESPONSE: In regions of the state where deeper income targeting may prevent the Development from being financially feasible, it would be wise not to attempt to claim the points associated with this scoring item. If the market in the region prevented such deep rent targeting the Development would not be at a competitive disadvantage with the other Applications submitted in the same region. The intent behind the change was to make the maximum score options for this scoring item and the Income Levels of the Tenants, both of which address deep rent targeting, more balanced. The net difference in maximum score between last year's rule and the proposed rule is 10% fewer units at 50% and 5% more units at 30%. Staff recommended no changes based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(8) - Selection Criteria - Costs of the Development by Square Foot (3), (4), (29)

COMMENT SUMMARY: Commenter (3) suggested the cost of the Adaptive Reuse of a building is more expensive than Rehabilitation or New Construction and the additional cost of the Development per square foot is not recognized through the Selection Criteria in the QAP. Commenter (3) suggested that at a minimum the cost per square foot in Downtown and Central Business Districts of any type be afforded the same treatment in this scoring item as a Single Room Occupancy Development. Commenters (3), (4) suggested that historic preservation developments involving Adaptive Reuse or Rehabilitation will cost more than comparable Adaptive Reuse or Rehabilitation Developments that do not meet the Secretary of Interior's Standards for Historic Rehabilitation as required to claim federal historic tax credits. In complying with the Standards and claiming historic tax credits a developer can bring additional funding to the table to finance these additional costs. According to federal tax law, an owner that claims both the housing tax credit and historic tax credit is required to reduce its basis for calculation of the housing tax credit by the amount of the historic tax credit which reduces the amount of housing tax credits needed to support the development. Commenter (29) suggested that historic preservation Developments which separately reference costs that will be financed with the proceeds of historic tax credits and will not be claimed as tax credit basis, be permitted to disregard such separately referenced costs in calculating the price per square foot for purposes of points under this scoring item. Commenter (4) suggested the following language be added at the end of this scoring item "to the extent that a Historic Preservation Development would qualify to receive 10 points for this item, but its construction costs are higher than the applicable maximum costs required to be eligible for the points, such points will still be awarded if the additional costs above threshold for the points are not included in the Development Cost Schedule, but are separately referenced and such costs and related percentage driven costs, will be financed with the proceeds of historic tax credits, and LIHTC are not requested or awarded on such costs."

STAFF RESPONSE: Staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(9) - Selection Criteria - Tenant Services (24), (32)

COMMENT SUMMARY: Commenter (24) suggested the following recommendations to the list of proposed tenant services, specifically as it relates to the disability of serious mental illness: increase related points for case management, add medication compliance/management; expand more on the pre-approved case worker services, home chore services, food pantry/common household items, annual health fair, quarterly health and nutritional courses and weekly exercise class; and add any other extracurricular activities that add balance and meaning to one's life. In addition, Commenter (24) suggested that given the income level of the targeted population (SSI or SSDI) some of the tenant services should be de-emphasized. Commenter (32) suggested points should be awarded to Developments at two levels: basic services that are required of every Development and receive no points and enhanced services which should be funded at a minimum of $5,000 per month adjusted for inflation, and should receive six points. Commenter further suggested the Department employ a Tenant Opportunities Coordinator supported by a Tenant Initiatives Commission composed of social workers and other experts that would work together to develop a list of baseline services that all Developments would be required to provide and the Department would monitor to ensure services are provided in conjunction with a services plan. A Development proposing enhanced services would submit a services plan that allows for a range of points and will be reviewed by the Coordinator with an opportunity by the Developer to address any deficiencies in the plan prior to the scoring of the application.

STAFF RESPONSE: In response to Commenter (24) staff's intent as it relates to the expansion of the tenant services was to offer services that would be utilized by the tenant population and that mirror what might be available to the general public. The Commenter assumes that the targeted population is single adults. The tax credit program offers services that would be available to all populations which include: families with children, seniors, persons with disabilities, etc. It has often been requested by management companies, at the time the Department performs on-site monitoring visits that guidance be given through better descriptions and the frequency of the services. Staff felt that based on the population being served some services were more appropriate than others. Moreover, housing tax credit properties, as stipulated under §42 of the Internal Revenue Code, cannot offer continual or frequent nursing, medical or psychiatric services without placing the ability to claim the tax credits at risk. Finally, any tenant services offered must be at no charge to the tenant and be available to all tenants. Staff believes the changes requested by Commenters (24), (32) present a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(13) - Selection Criteria - Community Revitalization, Historic Preservation or Rehabilitation (2), (3), (19), (20), (22), (26), (31), (36), (37), (38)

COMMENT SUMMARY: Commenter (2) suggested the inclusion of Rehabilitation under this scoring category de-prioritizes it among the scoring criteria and believes it should revert to a stand-alone scoring item indicating that §2306.802, specifically Class B indicates its prioritization. Commenter (3) suggested the Department should continue to incentivize Rehabilitation and Adaptive Reuse Developments regardless of whether the site is part of a Community Revitalization Plan or the Development proposed to use a historic building. Commenter (20) supports the incentives included in this section for existing housing that is part of Community Revitalization Plans. In addition, Commenter (20) stated that forty-six state agencies prioritize competitive 9% housing tax credits for preservation by creating set-asides or awarding points to applications that involve preservation and Rehabilitation of existing affordable housing. Commenters (19), (22), (26), (31), (36), (37), (38) suggested that the proposed scoring for this item allows rehabilitation an advantage in potential funding over New Construction Developments and suggested that equality be reestablished in the final draft so that New Construction Developments receive parity with Rehabilitation Developments. Commenters (19), (22), (31), (37), (38) suggested that New Construction development generate substantially more long term jobs that would put more Texans back to work and also create more opportunity for affordable housing in our State. Commenter (38) suggested that given the general set aside for At-Risk Developments as well as the point preference under this scoring item, Rehabilitation Developments are

double dipping. Commenter (38) further suggested that in addition to the set aside and the points Rehabilitation Developments also win the tie breaker. Commenter (38) suggested that equality between Rehabilitation and New Construction Developments be re-established.

STAFF RESPONSE: In response to Commenter (2) staff believes the Class B reference in §2306.802 "...which includes any other multifamily housing development with low income use or rental affordability restrictions" is accounted for in the Rehabilitation scoring item as proposed. In comparing the proposed change to last year's rule, an At-Risk application was prioritized as a result of the At-Risk set-aside and received 9 points (3 points for Rehabilitation and 6 points for Community Revitalization). The proposed change; therefore, would prioritize both At-Risk and non-At-Risk Applications and both would receive 6 points. While the initial draft presented to the Board in September identified Rehabilitation Developments as qualifying for 3 points, Board action resulted in an increase to 6 points and therefore preference for Rehabilitation Developments over New Construction. Staff notes that in the 2010 Application Round 67% of New Construction Developments received an award when the Selection Criteria reflected a slightly greater preference toward Rehabilitation. Since the level of rehabilitation the Department requires is significant, staff believes that most Developments should have been able to qualify for both items. By changing the point structure to allow Rehabilitation Developments a maximum of 6 points, though a modest change, would ensure that Rehabilitation Developments are not held up in receiving points because of the lack of a community-wide revitalization plan. Furthermore, New Construction with Community Revitalization are now given 3 points where in past years they received no points. Staff did not recommend any changes based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(14) - Selection Criteria - Pre-application Participation Incentive Points (2), (7), (28)

COMMENT SUMMARY: Commenter (2) suggested that precedent was set at a previous Board meeting whereby the Board allowed participant changes from pre-application to application in response to a staff termination. Commenter (2) stated that there is a certain amount of fluidity that takes place between pre-application and application and that the Department needs to allow Applicants this flexibility up until the full application is submitted. Commenter (2) suggested removing the added language under subparagraph (C) which reads "...includes as part of this exhibit, a certification signed by the principal(s) that signed the site control at pre-application confirming they are the same principal(s) at Application." Commenter (7) suggested that since a development team is not assembled at the pre-application stage this section should be modified to require at least one of the principals are still involved in the Application at full application, but not necessarily all of the same parties. Commenter (28) suggested more clarity is needed to determine whether in the instance where an entity has more than one Principal if only one Principal must stay the same or if they all must stay the same. Commenter (28) also suggested it is not clear whether all the Principals must sign the site control for the parties to be able to make this certification in the Application. Commenter (28) suggested the only true way for the Department to know it is working with the same team as from pre-application to application is to require an organizational chart in both stages of the application process and compare the two.

STAFF RESPONSE: The Board does not set precedent when applications are presented on a case-by-case basis. With regards to the case referred to by Commenter (2) the Board voted based on a lack of clarity in the 2010 QAP. Staff proposed language in the initial draft that clarifies the Department's intent. It is not the Department's intent to require the entire development team remain the same from pre-application to Application, but merely those executing the site control. There is no prohibition against adding Principals at Application; however, Principals identified in the site control at pre-application cannot be substituted at full Application. An organizational chart at the pre-application stage is not necessary in order to verify the requirement is met. Staff did not recommend any changes based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(15) - Green Building Initiatives

No public comment was received specifically to the Green Building Amenities in Selection; however, staff noted that minor administrative changes have been made to this section to ensure consistency with those Green Building Amenities listed in Threshold.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(16) - Development Location (2), (7), (32)

COMMENT SUMMARY: Commenter (2) suggested that the inclusion of the Third Party Funding outside of a QCT under this scoring item is problematic because it would result in all Applicants qualifying for the points and results in the loss of an objective scoring item that would differentiate deals. In addition, the Commenter suggested that Third Party Funding outside of a QCT was the counter balance for scoring item #24 regarding QCT's with Revitalization and suggested that the QAP is incentivizing development in poorer neighborhoods. Commenter (2) suggested the Development Location scoring item should allow for a maximum 6 or 8 points with the following possible for 2 points each with no limitation based on family or elderly: census tract income higher than county income, less than 10% poverty rate, recognized or exemplary school attendance zone, urban core, and four-story Development with structural parking located next to transportation/transit oriented district. Commenter (2) suggested this will show a true priority of de-concentrating lower income populations and provide more opportunities to the residents. Commenter (32) suggested the inclusion of the Third Party Funding outside of a QCT dramatically undercuts the effectiveness of the High Opportunity points by diluting them with a financing-oriented goal. Commenter (32) suggested these points should be assigned a separate category of points, perhaps incorporated in the scoring of "financial feasibility". Additionally, Commenter (32) suggested the points should be available for areas with low poverty, high area median-family income, and access to high performing schools and should be additive, rather than exclusive in that Applications should be eligible for low-poverty and high-income and exemplary school points, not low-poverty or high-income or exemplary school points. Commenter (32) further suggested that if these points are not made additive then the definition as proposed under the High Opportunity Area for the 30% boost regarding Developments in census tracts in the top quartile (when ranked by AMFI) of tracts in the county in which the Development is constructed should be revised in this section as well. Additionally, Commenter (32) suggested that the language for being in an exemplary or recognized school attendance zone be revised to exclude magnet schools. Commenter

(7) suggested that points for locating housing outside of high poverty areas (Item C) should be allowed for senior housing as well as family housing.

STAFF RESPONSE: Staff recommended moving the Third Party Funding Outside of a QCT as a stand-alone scoring item and recommended reverting to the 2010 QAP scoring of this item of 1 point. In response to Commenter (7), staff believes that §42(m)(1)(C)(vii) which states "tenant populations of individuals with children" provides a priority for Developments that are not senior housing only. In response to Commenter (32) regarding making the points additive under this scoring item and having Third Party Funding outside of a QCT be incorporated into the scoring of financial feasibility, staff believes the change requested presents a significantly new concept not contemplated in the proposed draft and would therefore require a new posting for public comment; therefore, staff does not recommend any changes. Additionally, in response to Commenter (32) the draft QAP as proposed excludes magnet schools or elementary schools with district-wide possibility of enrollment or no defined attendance zones.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(17) - Selection Criteria - Economic Development Initiatives

No public comment was received specific to this scoring item; however, staff recommended administrative changes. Specifically, one of the programs under subparagraph (D), Texas Department of Agriculture's Rural Municipal Finance Program, no longer exists and the Real Estate Development and Infrastructure Program is covered under Texas Capital Fund in subparagraph (B) of this scoring item. Therefore, staff recommended striking all of subparagraph (D).

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(a)(23) - Selection Criteria - Sponsor Characteristics (5)

COMMENT SUMMARY: Commenter (5) suggested the HUB scoring system could be strengthened by revising the scoring criteria to reflect the full 2 points be given to Developers who work with HUB's and only 1 point for attempts that are made to use a HUB when none exists. Commenter stated that the weak economy has presented a challenge to all our state's small businesses and some HUBs have had a hard time surviving.

STAFF RESPONSE: Staff agreed on the basis that requiring actual use of a HUB, as opposed to a plan to pursue use of a HUB is consistent with the establishment of preference for HUB utilization. Staff recommended the scoring for this item be revised to reflect 1 point for qualifying under subparagraph (A) and 2 points for qualifying under subparagraph (B).

BOARD RESPONSE: Accepted staff's recommendation.

§49.13(b) - Amendment of Application Subsequent to Allocation by Board (7), (28)

COMMENT SUMMARY: Commenters (7), (28) suggested that many amendments submitted to the Department are prepared by the Applicant and that the requirement for the amendment request to include a proposed form of amendment prepared at the Applicant's sole expense by an attorney licensed to practice law in the State of Texas is onerous and will add time and cost to the process. Commenter (7) suggested that many amendments are simple in nature and the Applicant should not have to incur additional legal costs when there is already a $2,500 amendment request fee. Commenter (28) suggested that if an Applicant believes an attorney's assistance is required for the amendment, it should be able to make that decision itself and not be compelled by the Department to do so. In addition, Commenter (28) suggested submitting an amendment request 45 days prior to a Board meeting may create problematic construction delays for properties that need to make a change while in the construction phase. Commenter (28) suggested the timeframe revert back to 30 days.

STAFF RESPONSE: Staff believes that amendments rely on legal requirements that are requested to be changed or altered from the application as it was originally submitted and approved and; therefore, the request in a proposed form of amendment is justified. Staff recommended deleting the requirement to use an attorney to prepare the proposed form of amendment only if requested by the Department. There are other minor administrative changes made to this section. In response to Commenter (28) regarding the timeframe by which amendment requests need to be submitted; staff notes that the proposed initial draft reflected a timeframe of 60 days prior to the Board meeting and based on Board action at the September Board meeting that timeline was negotiated to 45 days. Staff will endeavor to expedite amendment requests when they are submitted to the Department.

BOARD RESPONSE: Accepted staff's recommendation.

§49.14(m) - Penalties (32)

COMMENT SUMMARY: Commenter suggested there needs to be a strong incentive to developers to return their unused credits to the tax credit exchange program (or similar programs developed in the future) or face debarment from participation in future tax credit rounds.

STAFF RESPONSE: Staff believes there is currently a provision in the draft QAP regarding penalties associated with returning unused credits in an untimely manner. Staff did not recommend any changes based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

The Board approved the final order adopting the new sections on November 10, 2010.

The new sections are adopted pursuant to the authority of Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§49.3. Program Calendar.

All documentation noted in this section must be submitted to the Department offices located at 221 E. 11th Street, Austin, Texas 78701, by 5:00 p.m. (CST) by the date indicated.
Figure: 10 TAC §49.3

§49.4. Ineligible Applicants, Applications and Developments.

(a) Ineligible Applicants. An Applicant is ineligible if any Applicant, Development Owner, Developer or Guarantor involved with the Application:

(1) has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen (15) years preceding the Application deadline; or

(3) at the time of Application is subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) has any past due audits and has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a Commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than thirty (30) days after Volume III of the Application is submitted; or (§2306.6703(a)(1))

(5) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) A member of the Board; or

(B) The Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over Housing Tax Credits employed by the Department; (§2306.6703(a)(2))

(6) The Applicant proposes to replace in less than fifteen (15) years any private activity bond financing of the Development described by the Application, unless:

(A) The Applicant proposes to maintain for a period of thirty (30) years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) At least one-third of all the Units in the Development are public housing units or Section 8 Development-based Units; or

(C) The applicable private activity bonds will be redeemed only in an amount consistent with their proportionate amortization; or

(D) If the redemption of the applicable private activity bonds will occur in the first five years of the operation of the Development and complies with §429(h)(4), Internal Revenue Code of 1986:

(i) on the date the Certificate of Reservation is issued, the Texas Bond Review Board determines that there is not a waiting list for private activity bonds in the same priority level established under §1372.0321 of the Texas Government Code or, if applicable, in the same uniform state service region, as referenced in §1372.0231, Texas Government Code, that is served by the proposed Development; and

(ii) the applicable private activity bonds will be redeemed according to underwriting, if any, established by the Department; (§2306.6703)

(7) The Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) Is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) Has breached a contract with a public agency and failed to cure that breach; or

(C) Misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(8) There is, involving the Application or Applicant, a violation of §2306.6733 of the Texas Government Code;

(9) Has been voluntarily or involuntarily removed from a rent or income restricted multifamily Development by a lender, equity provider, or any other owners or investors as a Principal during the previous ten (10) years, however designated, or any combination thereof or if any litigation to effectuate such removal has been instituted, and is continuing at the time of Application the Department shall be promptly notified by the Applicant. The Applicant will provide the Department staff with such information as it may reasonably request to evaluate the facts and circumstances surrounding such actual or threatened removal and prepare a report to the Executive Director. The information considered and addressed in the report will include, but not be limited to those identified in subparagraphs (A) - (D) of this paragraph. The Executive Director will make a determination, based on the report, whether facts and circumstances are present that would support the institution of formal debarment proceedings. Any debarment under this provision shall be for a period that will not exceed five (5) years. No person shall be debarred except by formal action taken by the Department's Governing Board.

(A) Whether the Developer or Principal has invested more of its financial resources in the Development than it has received from or in connection with the Development;

(B) Whether such Developer or Principal had the ability to address the facts and circumstances that ultimately led to actual or threatened removal by other means or whether uncooperative parties or other facts and circumstances beyond its control prevented any other such resolution;

(C) The contributing or causative effect of circumstances beyond such Applicant's, Development Owner's, Developer's or Guarantor's control, such as significant changes in market conditions or a natural disaster; and

(D) The compliance history of the Development during the time of the Applicant's, Development Owner's, Developer's or Guarantor's involvement.

(b) Ineligible Applications. The Department will terminate an Application for those issues identified in paragraphs (1) - (11) of this subsection. In addition to termination, the Department may debar a Person for one (1) year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines those issues identified in paragraphs (1) - (8) of this subsection exist and the facts warrant debarment:

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has Controlling ownership interest in the Development Owner, Developer, or Guarantor, or any Affiliate that Controls one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material

Noncompliance with the LURA or if such Material Noncompliance is identified during the Application review or the program rules in effect for such property as further described in Chapter 60 of this title (relating to Compliance Administration); or (§2306.6721(c)(3))

(3) The Applicant, Development Owner, Developer, or any Guarantor, anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entity that is active in the ownership or Control has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to cure any fees described in §49.14 of this chapter (relating to Program Related Fees) seven (7) days prior to the Board meeting at which the decision for the Application is to be made; or

(5) An Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, violates §2306.1113 relating to Ex Parte Communication as further described in §49.7 of this chapter (relating to Application Process); or

(6) It is determined by the Department's Executive Director that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application; or

(7) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated during the twelve (12) months prior to the submission of the Application and through the date of final allocation due to a failure to meet contractual obligations; or

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award of non-tax credit funds from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing; or

(9) The Application is submitted after the Application submission deadline (time or date); includes an electronic submission that is unreadable by the Department's computer system; has an entire Volume of the Application missing; or has a Material Deficiency as defined under §1.1 of this title (relating to Definitions). If an Application is determined ineligible pursuant to this subsection, the Application will be terminated without further consideration and the Applicant will be notified of such termination. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant; or

(10) In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other Persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven (7) business days of the date of the request by the Department, the Department may terminate the Application; or

(11) If more than 50% of the Developer Fee is deferred as reflected in the Sources and Uses exhibit in the Application or the commitments from the lender or syndicator.

(c) Ineligible Developments. Those Developments identified in paragraphs (1) - (14) of this subsection are considered ineligible for funding under the Housing Tax Credit Program:

(1) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (as provided in the §42(i)(3)(B)(iii) and (iv) of the Code) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development;

(2) A property that provides continual or frequent nursing, medical or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(3) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor;

(4) Any Qualified Elderly Development with any Units having more than two bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such;

(5) Any Development with any building(s) with four or more stories that does not include an elevator;

(6) Any Qualified Elderly Development proposing more than 70% two-bedroom Units;

(7) Any Development that violates §1.15 of this title (relating to Integrated Housing Rule);

(8) Any Development located in an Urban Area involving New Construction, Reconstruction or Adaptive Reuse of Units (except for a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in §42(i)(3)(B)(iii) and (iv) of the Code) in which any of the designs in subparagraphs (A) - (E) of this paragraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings, but they do apply to the multifamily dwellings. An Application may reflect a total of Units for a given bedroom size greater than the percentages in subparagraphs (A) - (E) of this paragraph to the extent that the increase is only to reach the next highest number divisible by four:

(A) More than 30% of the total Units are one bedroom and/or Efficiency Units; or

(B) More than 55% of the total Units are two bedroom Units; or

(C) More than 40% of the total Units are three bedroom Units; or

(D) More than 5% of the total Units in the Development with four or more bedrooms; or

(E) Only two and three bedroom Unit Developments;

(9) Any Development which is intended to house seniors that is not consistent with the definition of a Qualified Elderly Development;

(10) Any Development that contains residential Units that violates the general public use requirement under Treasury Regulation §1.42-9;

(11) Development Sites with negative characteristics in subparagraphs (A) - (G) of this paragraph will be considered ineligible. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or TRDO-USDA are exempt. For purposes of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from all boundaries of the Development Site to all boundaries of the property containing the negative characteristic. If none of these negative features exist, the Applicant must sign a certification to that effect. The negative characteristics include:

(A) Developments located adjacent to or within 300 feet of junkyards;

(B) Developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail; (Rural Developments funded through TRDO-USDA are exempt);

(C) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) Developments where the buildings are located within the "fall line" of high voltage transmission power lines;

(F) Developments where the buildings are located within the accident zones or clear zones for commercial or military airports; or

(G) Development is located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

(12) One Mile Same Year Rule. Staff will not recommend an allocation in the same Application Round if the Developments are, or will be, located less than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's State Housing Credit Ceiling, the Development is considered to be in the calendar year in which the Board votes, not in the year of the State Housing Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million. For purposes of this chapter, any two sites not more than one linear mile apart are deemed to be "in a single community." (§2306.6711(f)) This restriction does not apply to the allocation of Housing Tax Credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio; and (§2306.67021)

(13) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department, based on the evaluation factors identified in the Site Evaluation form, augmented by any other inspections or other documented findings of the Department. The Department will advise the Applicant if it makes an initial finding that a proposed site is unacceptable and provide the applicant with a reasonable opportunity to address any identified concerns. If in the Department's reasonable judgment the Applicant is not able to address adequately the Department's concerns regarding the site, the Department will issue a determination that the site is unacceptable. If not appealed in accordance with §49.10(d) of this chapter (relating to Appeals Process), this determination becomes final.

(14) Development Amenities. These amenities must be at no charge to the tenants. All New Construction, Reconstruction or Adaptive Reuse Units must provide the amenities in subparagraphs (A) - (M) of this paragraph. Rehabilitation Developments must provide the amenities in subparagraphs (C) - (M) of this paragraph unless expressly identified as not required. (§2306.187) Deviations for good cause, by which one or more of the foregoing will not be provided, must be approved prior to award and the request for such deviation must be included in the Application. The Executive Director may issue such approvals. Requests not approved may be appealed to the Board in accordance with §49.10(d) of this chapter.

(A) All New Construction Units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(B) Laundry Connections;

(C) Blinds or window coverings for all windows;

(D) Screens on all operable windows;

(E) Disposal and Energy-Star rated dishwasher (not required for TRDO-USDA or SRO Developments; Rehabilitation Developments exempt from dishwasher if one was not originally in the unit);

(F) Energy-Star rated refrigerator;

(G) Oven/Range;

(H) Exhaust/vent fans (vented to the outside) in bathrooms;

(I) Energy-Star rated ceiling fans in living areas and bedrooms;

(J) Energy-Star rated lighting in all Units which may include compact florescent bulbs;

(K) Plumbing fixtures (toilets and faucets) must meet design standards at 30 TAC §290.252;

(L) All Units must be air-conditioned; and

(M) Fire sprinklers in all Units where required by local code.

§49.5. Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction or Reconstruction and located within the one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation (excluding Reconstruction) with the exception of Developments with existing and ongoing federal funding assistance from HUD or TRDO-USDA, will be permitted in the one-hundred (100) year floodplain unless they already meet the requirements established in this subsection for New Construction, or if the Unit of General Local Government has undertaken mitigation

efforts and can establish that the property is no longer within the one-hundred (100) year floodplain.

(b) Credit Amount. (§2306.6711(b)) An Applicant may not request more than $2 million in annual tax credits for any given Application. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party, Affiliate or Guarantor (unless the Guarantor is also the General Contractor, and is not a Principal of the Applicant, Developer, Related Party or Affiliate of the Development Owner). Tax-Exempt Bond Development Applications are not subject to this limitation and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. Competitive Housing Tax Credits approved by the Board during the 2011 calendar year, including commitments from the 2011 Credit Ceiling and forward commitments from the 2012 Credit Ceiling, are applied to the credit cap limitation for the 2011 Application Round. In order to evaluate this $2 million limitation, nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. All entities that share a Principal are Affiliates. For purposes of determining the $2 million limitation of tax credits, a Person is not deemed to be an Affiliate solely because it:

(1) raises or provides equity;

(2) provides "qualified commercial financing";

(3) is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) receives fees as a Development Consultant or Developer that do not exceed 10% of the Developer Fee (or 20% for Qualified Nonprofit Developments) to be paid or $150,000, whichever is greater.

(c) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units.

(2) Developments in Rural Areas involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units. Rehabilitation Developments (excluding Reconstruction) do not have a limitation as to the number of Units.

(3) Urban Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings), in the Competitive Housing Tax Credit Application Round will be limited to 252 total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 restricted and total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For Applications that are proposing an additional phase to an existing tax credit Development; that are otherwise adjacent to an existing tax credit Development; or that are proposing a Development on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:

(A) the first phase of the Development has been completed and has maintained occupancy of at least 90% for a minimum six (6) month period as reflected in the submitted rent roll; or

(B) a resolution from the Governing Body of the city or county, in which the proposed Development is located, dated no more than one (1) year old from the date the Application is submitted. Such resolution must state that there is a need for additional Units and that the Governing Body has reviewed a market study, the conclusion of which supports the need for additional Units. The resolution must be submitted to the Department by the Resolution Delivery Date as indicated in §49.3 of this chapter (relating to Program Calendar); or

(C) the proposed Development is intended to provide replacement of previously existing affordable Units on the Development Site or that were originally located within a one mile radius from the Development Site; provided, however, the combined number of Units in the proposed Development may not exceed the number of Units being replaced. Documentation of such replacement units must be provided.

(d) Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will only recommend a 30% increase in Eligible Basis if (paragraphs (2) and (3) of this subsection do not apply to Tax-Exempt Bond Applications):

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 30% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a QCT that has in excess of 30% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5)(C) of the Code, unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings). Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. The eleven (11) digit census tract number must be clearly marked on the map. These ineligible Qualified Census Tracts are outlined in the 2011 Housing Tax Credit Site Demographic Characteristics Report; or

(2) The Development qualifies for and receives Renewable Energy Tax Credits. For purposes of this paragraph, the Application will be required to include an architect's letter or signed third party contractor bid as evidence that the Applicant will be eligible to request Renewable Energy Tax Credits in its income tax filings. In addition, the architect's letter or signed third party contractor bid must include a statement that the increased cost differential of the Renewable Energy items over non Renewable Energy alternatives exceeds the value of the energy tax credits to be received. The Applicant will be required to show proof of receipt of the Renewable Energy Tax Credits at the time of Cost Certification. Any amenities as it relates to this item must benefit the entire Development; or

(3) Pursuant to the authority granted by H.R. 3221, the Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph:

(A) Any Rural Development;

(B) Developments proposing at least 50% of the total number of Units for Supportive Housing;

(C) Developments proposing to provide 10% of the Low-Income Units, that will serve individuals and families at or below 30% of AMGI, in excess of those that are in §49.9(a)(3) of this chapter (relating to Selection Criteria); or

(D) Developments proposed in high opportunity areas as provided in clauses (i) - (iii) of this subparagraph:

(i) A four story or greater Development with structural parking that is proposed to be located within one-quarter mile of existing major bus transfer centers, regional or local commuter rail transportation stations, and/or Transit Oriented Districts that are accessible to all residents including Persons with Disabilities; or

(ii) A Development that is proposed to be located in a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located as of the first day of the Application Acceptance Period; or

(iii) A Development that is proposed in a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2011 Housing Tax Credit Site Demographic Characteristics Report).

(4) The Development proposing to build in an area impacted by a disaster for which federal legislation providing additional credits has been enacted.

§49.6. Allocation Process.

(a) Regional Allocation Formula. This formula, developed by the Department, establishes separate targeted tax credit amounts for Rural Areas and Urban Areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's website. The regional allocation for Rural Areas is referred to as the Rural Regional Allocation and the regional allocation for Urban Areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each Uniform State Service Region. (§2306.111(d)(3); §2306.1115)

(b) Allocation Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies: (§2306.111(d))

(1) Nonprofit Set-Aside. At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of §42(h)(5) of the Code. Qualified Nonprofit Organizations must have the Controlling interest in the Development Owner applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement; (§2306.6729 and §2306.6706(b))

(2) USDA Set-Aside. At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through TRDO-USDA. (§2306.111(d)(2)) If an Application in this Set-Aside involves Rehabilitation it will be attributed to and come from the At-Risk Development Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program, in whole or in part, will not be considered under this Set-Aside. Any Rehabilitation or Reconstruction of an existing §515 Development that retains the §515 loan and restrictions will be considered under the At-Risk Development and TRDO-USDA Set-Asides, unless such Development is also financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program. Commitments of 2011 Competitive Housing Tax Credits issued by the Board in 2011 will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Set-Aside for the 2011 Application Round as appropriate;

(3) At-Risk Set-Aside. At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (a) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation Developments funded with TRDO. An At-Risk Development is a Development that: (§2306.6702)

(A) Has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Section 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514 - 516, Housing Act of 1949 (42 U.S.C. §§1484 - 1486); or

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42); and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two (2) calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted);

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site;

(D) Developments must be at risk of losing affordability from the financial benefits available to the Development and must retain or renew all possible financial benefit if available, and at least maintain existing affordability to qualify as an At-Risk Development;

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(c) Redistribution of Credits. (§2306.111(d)) If any amount of Housing Tax Credits remain after the initial commitment of Housing Tax Credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides based on the need to most closely achieve regional allocation goals and the level of demand exhibited in the Uniform State Service Regions during the Application Round. However, if there are any tax credits set aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after the allocation under §49.7(g)(3) of this chapter (relating to Application Process), those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)) As described in subsection (b)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§49.7. Application Process.

(a) General. The application process has two parts, a pre-application which is voluntary and applies only to Applications submitted under the State Housing Credit Ceiling and an Application which is mandatory. An Applicant that does not provide an Application on or before the deadlines provided for herein is not eligible to be placed on the list of eligible Applicants to which awards of tax credits may be made. Pre-applications and Applications submitted to the Department are subject to restrictions on Ex Parte Communications as further described in paragraph (1) of this subsection and the Administrative Deficiency process as further described in paragraph (2) of this subsection.

(1) Ex Parte Communications. (§2306.1113)

(A) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, except for communications that actually occur in properly posted open meetings, as permitted by §2306.1113 of the Texas Government Code a member of the Board may not communicate with any other Board member or with the following Persons:

(i) an Applicant or Related Party; and

(ii) any Person who is:

(I) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(-a-) a General Contractor; and

(-b-) a Developer; and

(-c-) a General Partner, Principal or Affiliate of a General Partner or General Contractor; or

(II) employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(B) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, an employee of the Department may communicate about any Application with the following Persons:

(i) the Applicant or a Related Party; and

(ii) any Person who is:

(I) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(-a-) a General Partner or General Contractor; and

(-b-) a Developer; and

(-c-) a Principal or Affiliate of a General Partner or General Contractor; or

(II) employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(C) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the Internet, and must satisfy the following conditions:

(i) the communication must be restricted to technical or administrative matters directly affecting the Application;

(ii) the communication must occur or be received on the premises of the Department during established business hours; and

(iii) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(I) the date, time, and means of communication;

(II) the names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(III) the subject matter of the communication; and

(IV) a summary of any action taken as a result of the communication.

(D) Notwithstanding subparagraph (A) or (B) of this paragraph, a Board member or Department employee may communicate without restriction with a Person listed in subparagraph (A) or (B) of this paragraph during any Board meeting or public hearing held with respect to the Application, but not during a recess or other non-record portion of the meeting or hearing.

(E) Subparagraph (A) of this paragraph does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(2) Administrative Deficiency Process. The purpose of the Administrative Deficiency process is to allow the Applicant an opportunity to provide clarification or correction to information originally submitted in the Application. For example, if exhibits and other information required under §49.8 of this chapter (relating to Threshold Criteria) are not originally submitted in the Application (i.e. financing commitment missing entirely from the Application) staff will recommend termination of the Application. However, for information missing in part from the Application (i.e. financing commitment is submitted but it is not executed by the lender) staff will request the missing or corrected information via an Administrative Deficiency. For exhibits and other information required under §49.9 of this chapter (relating to Selection Criteria) not originally submitted in the Application (i.e. Community Revitalization Plan or letter from Appropriate Local Offi-

cial missing entirely from the Application) staff will not award points for that item, even if points were requested in the Applicant's Self Scoring Form. For information missing in part from the Application (i.e. the letter from the Appropriate Local Official does not include all required information) staff will request the missing information via an Administrative Deficiency and award points provided the information submitted in response to the Administrative Deficiency is satisfactory to the Department.

(A) Administrative Deficiencies for Applications submitted under the State Housing Credit Ceiling and Rural Rescue Applications. If an Application contains Administrative Deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Selection, Threshold Criteria, Quantifiable Community Participation (QCP) and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then five (5) points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any Set-Asides, increase the requested credit amount, revise the Unit mix (both income levels and bedroom mixes), or adjust their self-score except in response to a direct request from the Department as a result of an Administrative Deficiency or by approved amendment of an Application after a commitment or allocation of tax credits as further described in §49.13(b) of this chapter (relating to Board Reevaluation) (§2306.6708). This Administrative Deficiency process applies to requests for information made by the Real Estate Analysis Division during their review. To the extent that the review of Administrative Deficiency documentation during the review alters the score assigned to the Application, Applicants will be re-notified of their final score.

(B) Administrative Deficiencies for Tax Exempt Bond Applications. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five (5) business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination pursuant to §49.4 of this chapter (relating to Ineligibility). The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid. This Administrative Deficiency process applies equally to the Real Estate Analysis Division review and feasibility evaluation and the same penalty and termination will be assessed.

(b) Pre-application Submission. The purpose of the pre-application process is to enable Applicants interested in pursuing the Application to assess generally who else is interested in submitting Applications and the nature of their proposed Development. Based on an understanding of the potential competition they can make a better and more informed decision whether they wish to proceed to prepare and submit an Application.

(1) As used herein a "complete pre-application" means a pre-application that meets all of the Department's criteria for an Application with all required information and exhibits provided pursuant to the application checklist provided in the Tax Credit (Procedures) Manual.

(2) The pre-application must be submitted in accordance with the Application Acceptance Period and Pre-application Final Delivery Date as identified in §49.3 in this chapter (relating to Program Calendar).

(3) To submit the complete pre-application the Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete pre-application to the Department prior to the Pre-application Final Delivery Date.

(4) The pre-application must be accompanied by a paper certification with an original signature in the form provided in the pre-application. Furthermore, the pre-application must be a single file, individually bookmarked at each of the required volumes and exhibits presented in the order as required in the application checklist.

(5) If a pre-application is not submitted to the Department on or before the applicable deadline indicated in §49.3 of this chapter, the Applicant will be deemed to have not made a pre-application.

(6) The required pre-application fee as described in §49.14 of this chapter (relating to Program Related Fees) must be submitted with the pre-application in order for the pre-application to be accepted by the Department.

(7) Only one pre-application may be submitted by an Applicant for each site. Prior to the pre-application deadline Applicants may withdraw their pre-application and subsequently file a new pre-application utilizing the original pre-application fee that was paid as long as no evaluation was performed by the Department.

(8) Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the

time of pre-application. The rejection of a pre-application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(c) Pre-application Threshold Criteria. The Pre-application Threshold Criteria include:

(1) Submission of a pre-application;

(2) Evidence of Site Control through March 1, 2011 as evidenced by the documentation required under §49.8(8)(A) of this chapter; and

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. (§2306.6704)

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(i) No later than the Pre-application Neighborhood Organization Request Date identified in §49.3 of this chapter, the Applicant must e-mail, fax or mail with registered receipt (email or fax to be "receipt confirmed") a completed "Neighborhood Organization Request" letter as provided in the pre-application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) If no reply letter is received from the local elected officials by the Pre-application Response to Neighborhood Organization Request Date, then the Applicant must certify to that fact in the pre-application;

(iii) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the pre-application submission.

(B) Not later than the date the pre-application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-application Notification Template" provided in the pre-application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of notification is required in the form of a certification provided in the pre-application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph, in the event that the Department requires proof of notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the pre-application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (general or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and any market rate Units, if applicable. Rents to be provided are those that are effective at the time of the pre-application, which are subject to change as annual changes in the area median income occur; and

(ix) The expected completion date if credits are awarded.

(D) Pre-applications not meeting the Pre-application Threshold Criteria identified in this subsection will be terminated and the Applicant will receive a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Pre-application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(d) Pre-application Results. Only pre-applications which have satisfied all of the Pre-application Threshold Criteria requirements set forth in subsection (c) of this section and §49.9(a)(14) of this chapter, will be eligible for pre-application points. The order and scores of those Developments released on the Pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-application Submission Log. Inclusion of a Development on the Pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

(e) Application Submission. An Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application in order to be considered for Housing Tax Credits.

(1) As used herein a "complete application" means an Application that meets all of the Department's criteria for an Application with all required information and exhibits provided pursuant to the application checklist provided in the Tax Credit (Procedures) Manual.

(2) For Applications submitted under the State Housing Credit Ceiling, the Application must be submitted by the Full Application Delivery Date as identified in §49.3 of this chapter. The Full Application Delivery Date for Tax-Exempt Bond Developments is triggered by the Certificate of Reservation issued by the Texas Bond Review Board and is further defined in §49.11 of this chapter (relating to Tax-Exempt Bond Developments).

(3) To submit the complete application the Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete application to the Department.

(4) The Application must be accompanied by a paper certification with an original signature in the form provided in the Application. Furthermore, the Application must be a single file, individually bookmarked at each of the required volumes and exhibits presented in the order as required by the application checklist.

(5) If an Application is not submitted to the Department on or before the applicable deadline indicated in paragraph (1) of this subsection, the Applicant will be deemed to have not made an Application.

(6) The required Application fee as described in §49.14 of this chapter must be submitted with the Application in order for the Application to be accepted by the Department.

(7) Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original Pre-application Fee that was paid as long as no evaluation was performed by the Department.

(f) Evaluation Process. Applications submitted for consideration (including Tax Exempt Bond Developments) will be reviewed according to the Eligibility, Threshold and for competitive applications under the State Housing Credit Ceiling, for Selection Criteria. An Application, during any of these stages of review, may be determined to be ineligible as further described in §49.4 of this chapter. Applicants will be notified in these instances.

(g) Subsequent Evaluation and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division. In general these will be those Applications identified as most competitive and that meet the requirements of Eligibility and Threshold. However, an Application may be reviewed by the Real Estate Analysis Division prior to the completion of the Eligibility and Threshold reviews. The procedure identified in paragraphs (1) - (6) of this subsection will also be used in making recommendations to the Board:

(1) Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in §49.6(b)(2) of this chapter (relating to USDA Set-Aside) are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region;

(2) Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in §49.6(b)(3) of this chapter (relating to At-Risk Set-Aside) of this chapter are attained;

(3) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under §49.6(a) of this chapter (relating to Regional Allocation Formula), without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region;

(4) If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after allocation under paragraph (3) of this subsection those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Region's Rural Allocation. (§2306.111(d)(3)) This will be referred to as the Rural collapse;

(5) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural Regional Allocation or Urban Regional Allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region's allocation. This will be referred to as the statewide collapse;

(6) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to Qualified Nonprofit Organizations to satisfy the Nonprofit Set-Aside. If 10% is not met through the existing competitive process, then the Department will add the highest scoring Application by a Qualified Nonprofit Organization statewide until the 10% Nonprofit Set-Aside is met. Staff will ensure that at least 20% of the State Housing Credit Ceiling is allocated to Rural Developments. If this 20% minimum is not met through the existing competitive process, then the Department will add the highest scoring Rural Development Application statewide until the 20% Rural Development Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible Applications, will be redistributed as provided in §49.6(c) of this chapter (relating to Redistribution of Credits). If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §49.5(b) of this chapter (relating to Credit Amount), the Department will make its recommendation by selecting the Development(s) that most effectively satisfy the Department's goals in meeting Set-Aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available Housing Tax Credits according to regional allocation goals

and Set-Aside categories. To enable the Board to establish a waiting list, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a) - (f); §2306.111)

(h) Underwriting Evaluation. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate allocation of Housing Tax Credits. In making this determination, the Department will use the Underwriting Rules and Guidelines found in §1.32 of this title. The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(i) Compliance Evaluation. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status in accordance with Chapter 60 of this title (relating to Compliance Administration), and will be evaluated in detail for eligibility under §49.4 of this chapter.

(j) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the Development Site based upon the criteria set forth in the Site Evaluation form. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(k) Application Process for Rural Rescue Applications under the 2012 Credit Ceiling. The Rural Rescue Applications will be reviewed according to the process outlined in this subsection.

(1) Submission Requirements. Rural Rescue Applications may be submitted during the Rural Rescue Application Submission Period as identified in §49.3 of this chapter. A complete Application must be submitted at least sixty (60) days prior to the date of the Board meeting at which the Applicant would like the Board to act on the proposed Development. Applications must include the full Application Fee as further described in §49.14 of this chapter. Applicants must submit documents in accordance with the application checklist provided in the Tax Credit (Procedures) Manual for all Volumes, including Volume IV.

(A) Applications will be processed on a first-come, first-served basis. Applications unable to meet all Administrative Deficiency and underwriting requirements within thirty (30) days of the request by the Department, will remain under consideration, but will lose their submission status and the next Application in line will be moved ahead in order to expedite those Applications ready to proceed. Applications for Rural Rescue will be processed and evaluated as described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(B) Prior to the Development being recommended to the Board, TRDO-USDA shall provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, if applicable.

(2) Eligibility and Threshold Review. All Rural Rescue Applications will be reviewed pursuant to §49.8 and §49.9 of this chapter. Additional eligibility requirements include the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must be able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an Application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the Application is submitted under one ownership structure, one financing plan and for which there are no market rate units; and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations.

(3) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria pursuant to §49.9 of this chapter and a score will be assigned to the Application. The minimum score for Selection Criteria as identified in §49.9(a) of this chapter is not required to be achieved to be eligible.

(4) Credit Ceiling and Applicability of this chapter. All Rural Rescue Applicants will receive their credit allocation out of the 2012 Credit Ceiling and therefore, will be subject to the rules and guidelines identified in the 2012 Qualified Allocation Plan (QAP). However, because the 2012 QAP will not be in effect during the time period that the Rural Rescue Applications can be submitted, Applications submitted and eligible under the Rural Rescue Set-Aside will be considered to have satisfied the requirements of the 2012 QAP by having satisfied the requirements of the 2011 QAP, to the extent permitted by statute.

(5) Procedures for Recommendation to the Board. Consistent with subsection (c) of this section, staff will make its recommendation to the Committee. The Committee will make Commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §49.10(a) of this chapter (relating to Board Decisions). Any award made to a Rural Rescue Development will be credited against the TRDO-USDA Set-Aside for the 2011 Application Round, as required under subsection (g)(3) of this section.

(6) Limitation on Allocation. No more than $350,000 in credits will be forward committed from the 2011 State Housing Credit Ceiling. To the extent Applications are received that exceed the maximum limitation; staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

§49.8. Threshold Criteria.

The Threshold Criteria listed in this section are mandatory requirements that must be submitted at the time of Application submission unless specifically indicated otherwise. If any of the Threshold Criteria

indicated below are not resolved, clarified or corrected to the satisfaction of the Department, through the Administrative Deficiency process the Application will be terminated.

(1) Submission of the Application. Includes the entire Uniform Application and any other supplemental forms which may be required by the Department and in the format prescribed by the Department. (§2306.1111)

(2) Governing Body Resolutions. The following resolutions, if applicable to the proposed Development, must be submitted by the Resolutions Delivery Date as indicated in §49.3 of this chapter (relating to Program Calendar) and may not be more than one year old from the date the Volume 1 is submitted to the Department.

(A) Twice the State Average. If the Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the Certificate of Reservation is issued by the Texas Bond Review Board) the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must reference this rule and authorize an allocation of Housing Tax Credits for the Development; (§2306.6703(a)(4))

(B) One Mile Three Year Rule. If the Applicant proposes to construct a Development proposing New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(i) Serves the same type of household as the new Development, regardless of whether the Development serves families, elderly individuals, or another type of household; and

(ii) has received an allocation of Housing Tax Credits or private activity bonds for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(iii) has not been withdrawn or terminated from the Housing Tax Credit Program;

(iv) an Application is not ineligible under this paragraph if:

(I) the Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.); or

(II) the Development is located in a county with a population of less than one million; or

(III) the Development is located outside of a metropolitan statistical area; or

(IV) the Governing Body, of the Unit of General Local Government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph.

(v) In determining when an existing Development received an allocation as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §49.9(b) of this chapter (relating to Selection Criteria).

(C) Developments in Certain Census Tracts. Staff will not recommend and the Board will not allocate Housing Tax Credits for a Competitive Housing Tax Credit or Tax-Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless:

(i) The Development is in a Place whose population is less than 100,000;

(ii) The Applicant proposes only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or

(iii) Submits to the Department an approval of the Development referencing this rule in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development. These ineligible census tracts are outlined in the 2011 Housing Tax Credit Site Demographic Characteristics Report.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $15,000 per Unit in direct hard costs (including site work, contingency, contractor profit, overhead, and general requirements) unless financed with TRDO-USDA in which case the minimum is $9,000.

(4) Experience Certification. No later than the Experience Certification Delivery Date as indicated in §49.3 of this chapter, an Applicant must submit the documents required in this section to obtain the required certification. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in its Application(s). Experience must meet the criteria of both subparagraphs (A) and (B) of this paragraph with evidence of such provided as stated in subparagraphs (C) and (D) of this paragraph.

(A) One of the Principals of the Development Owner, General Partner, Developer or the General Contractor must provide evidence reasonably acceptable to the Department that they have acquired actual experience through previous participation in and subsequent completion of comparable residential units (single family, multifamily) as demonstrated by the submission of a housing tax credit Application, receipt of award, submission of post award activities (Commitment, Carryover, 10% test, etc.), construction oversight, lease-up, stabilization, and receipt of IRS Forms 8609. Executive Directors of non-profits and public housing authorities may qualify for this experience requirement; and

(B) The Principal requesting the certificate must have experience with the same type of construction as the Application is proposing (single family, multifamily, new construction, rehabilitation, etc.) and have acquired their experience in connection with a development with at least 80% as many units as the Units in the Development for which Application is being made, in no event less than 36 units. The Department will, in issuing an Experience Certificate, state any limitations. Persons who establish that they have participated in the development of 200 units or more will not be further restricted by size. Experience of multiple parties may not be aggregated. Rehabilitation experience must have been substantial and involved at least $15,000 of direct cost per Unit.

(C) Evidence for experience must clearly indicate that:

(i) the Principal was a Principal of the Development Owner, General Partner or Developer (of the Development submitted as experience) during the complete specified timeframe and process as identified in subparagraph (A) of this paragraph; and

(ii) the Development has been completed (as evidenced by the number of Units completed); and

(iii) the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(D) One or more of the following documents must be submitted as evidence of completion of the development:

(i) American Institute of Architects (AIA) Document A111 - Standard Form of Agreement between Owner & Contractor;

(ii) AIA Document G704 - Certificate of Substantial Completion;

(iii) AIA Document G702 - Application and Certificate for Payment;

(iv) Certificate of Occupancy;

(v) IRS Form 8609, (only one for per development is required);

(vi) HUD Form 9822;

(vii) Development agreements;

(viii) Partnership agreements; or

(ix) other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience.

(5) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic common amenities selected for the Development. All Developments must meet at least the minimum threshold of points based on the total number of Units in the Development. These points are not associated with the Selection Criteria points in §49.9(a) of this chapter. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments proposing Rehabilitation (excluding Reconstruction) or proposing Single Room Occupancy will receive 1.5 points for each point item (do not round). Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the threshold test applied based on the number of Units per individual site, and must submit a separate certification for each individual site under control by the Applicant. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §49.13(b) of this chapter (relating to Amendments) and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment, Determination Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points as follows:

(I) Total Units are less than 16, 1 point is required to meet Threshold;

(II) Total Units are 17 to 24, 3 points are required to meet Threshold;

(III) Total Units are 25 to 40, 4 points are required to meet Threshold;

(IV) Total Units are 41 to 76, 7 points are required to meet Threshold;

(V) Total Units are 77 to 99, 10 points are required to meet Threshold;

(VI) Total Units are 100 to 149, 13 points are required to meet Threshold;

(VII) Total Units are 150 to 199, 16 points are required to meet Threshold; or

(VIII) Total Units are 200 or more, 19 points are required to meet Threshold;

(ii) The amenities include those items listed in subclauses (I) - (XXVI) of this clause. Both general population and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in subparagraphs (D) and (F) of this paragraph. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population. The Applicant is instructed to review Chapter 60 of this title (relating to Compliance Administration) for detailed definitions and standards as it relates to the amenities listed in this subparagraph;

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (2 points);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking/jogging path separate from a sidewalk (1 point);

(V) Community laundry room with at least one washer and dryer for each 25 Units (1 point);

(VI) Barbecue grill and picnic table-at least one of each for every 50 Units (1 point);

(VII) Covered pavilion that includes barbecue grills and tables (2 points);

(VIII) Swimming pool (3 points);

(IX) Furnished fitness center (2 points);

(X) Equipped and functioning business center or equipped computer learning center (2 points);

(XI) Furnished Community room (1 point);

(XII) Library with an accessible sitting area (separate from the community room) (1 point);

(XIII) Enclosed community sun porch or covered community porch/patio (2 points);

(XIV) Service coordinator office in addition to leasing offices (1 point);

(XV) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(XVI) Health Screening Room (1 point);

(XVII) Secured Entry (elevator buildings only) (1 point);

(XVIII) Horseshoe pit, putting green or shuffleboard court (1 point);

(XIX) Community Dining Room w/full or warming kitchen (3 points);

(XX) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (1 point);

(XXI) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(XXII) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(XXIII) Furnished and staffed Children's Activity Center (3 points);

(XXIV) Community Theater Room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points);

(XXV) Dog Park (2 points); or

(XXVI) Green Building amenities that include the following:

(-a-) Development Energy Savings (1 point for each item):

(-1-) at least 50% of the water needed annually for site irrigation is from a rain water harvesting/collection system and/or locally approved gray water collection system; or

(-2-) native trees and plants installed that are appropriate to the site's soils and microclimate and located to allow for shading in the summer and heat gain in the winter;

(-b-) Tenant Energy Savings (2 points for each item):

(-1-) On-site photovoltaic panels or wind-driven turbines for generating at least 5kW of electricity that are incorporated into the engineered structural design of the roof(s) and neither of which protrude from any roof structure by more than 8 feet and are designed and wired to supplement the Development's electric power. Photographs and data sheets of the proposed equipment must be submitted with the Application;

(-2-) If the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(-3-) If the east-west axis of the building oriented within 15 degrees of due east-west utilizes a narrow floor plate (less than 40 feet) and single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation;

(-4-) 100% of HVAC condenser units are located so they are fully shaded 75% of the time during summer months (May through August);

(-5-) Solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west; applies only to rehabilitation where windows are not replaced with Energy Star rated windows;

(-6-) Install low-flow or high efficiency toilets that exceed State requirements;

(-7-) Install bathroom lavatory faucets, showerheads and kitchen faucets that exceed the State standard. All fixtures throughout the Development must meet the standard at the time of Application. Rehabilitation Developments may install compliant faucet aerators instead of replacing entire faucets;

(-8-) Provide solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire Development;

(-9-) Sub-metered utility meters for any utility in a Rehabilitation Development which was not already sub-metered at the time of Application;

(-10-) If the Development uses Energy-Star qualified windows and glass doors exclusively; insulation, and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and Energy Star rated HVAC, and domestic hot water heaters, and insulation that exceeds Energy Star standards;

(-11-) If the Development promotes energy efficiency by demonstrating a certified HERS score of 85 or lower;

(-12-) Thermally and draft efficient doors (SHGC of 0.40 or lower (for doors with glass) and U-value specified by climate zone according to the 2006 IECC) (2 points); or

(-13-) Recycling service provided throughout the compliance period;

(-c-) Other Green Features/Indoor Health (1 point for each item):

(-1-) Renewable materials, provide at least one of the following: bamboo flooring, wool carpet, linoleum flooring, straw board cabinetry, poplar OSB, or cotton batt insulation;

(-2-) Healthy flooring, provide at least one of the following for 50% of flooring: finished concrete or ceramic tile resilient flooring material that is Floor Score Certified, applied with a Floor Score Certified adhesive and comes with a minimum seven (7) year wear through warranty; or

(-3-) Healthy finish materials, use paints, stains, adhesives, and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standard;

(-d-) LEED (Leadership in Energy and Environmental Design) Certification. If at the time of Cost Certification a LEED Certification (Certified, Silver, Gold or Platinum levels) for the Development is obtained then the maximum points allowed under this paragraph will be awarded and none of the green building amenities selected under this paragraph will need to be substantiated. Conversely, if at the time of Cost Certification a LEED Certification has not been obtained then the Applicant will be required to prove up 6 points under this subparagraph;

(B) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the points in §49.9(a)(4) of this chapter. Developments proposing Rehabilitation (excluding Reconstruction) or Single Room Occupancy will not be subject to the requirements of this subparagraph.

(i) 550 square feet for an Efficiency Unit;

(ii) 650 square feet for a one Bedroom Unit that is not in a Qualified Elderly Development; 550 square feet for a one Bedroom Unit in a Qualified Elderly Development;

(iii) 900 square feet for a two Bedroom Unit that is not in a Qualified Elderly Development; 700 square feet for a two Bedroom Unit in a Qualified Elderly Development;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit;

(C) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(D) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(E) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(F) Pursuant to §2306.6722 of the Texas Government Code, any Development supported with a Housing Tax Credit allocation shall comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C, and this subparagraph. (§2306.6722 and §2306.6730)

(G) For Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(H) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10% Test Documentation is submitted and in actual construction upon Cost Certification. (§2306.6725(b)(1))

(I) A certification that the Development will be built by a General Contractor hired by the Development Owner or the Applicant; if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(J) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 of the Texas Government Code and as further described in §1.37 of this title (relating to Reserve for Replacement Rules and Guidelines).

(K) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a Neighborhood Organization for purposes of §49.9(a)(2) of this chapter, has not given money or a gift to cause the Neighborhood Organization to take its position of support or opposition, nor has provided any assistance to a Neighborhood Organization outside of the assistance allowed under §49.9(a)(2)(A)(viii) to meet the requirements under §49.9(a)(2) of this chapter as it relates to the Applicant's Application or any other Application under consideration in 2011.

(L) Operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title.

(M) A certification that the Development Owner will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(N) A certification that the Development Owner will affirmatively market to veterans through direct marketing or contracts with veteran's organizations. The Development Owner will be required to identify how they will affirmatively market to veterans and report to the Department in the annual housing report on the results of the marketing efforts to veterans. Exceptions to this requirement must be approved by the Department.

(O) A certification that the Applicant, Development Owner, Developer or Guarantor involved with the Application has not been voluntarily or involuntarily removed from a rent or income restricted multifamily Development by a lender, equity provider, or other investors or owners as a Principal during the previous ten (10) years, however designated, or any combination thereof or if any litigation to effectuate such removal has been instituted and is continuing at the time of Application. If an Applicant or Developer signs the certification, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded.

(6) Architectural Drawings. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in subparagraphs (A) - (C) of this paragraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in subparagraphs (A) and (C) of this paragraph are required:

(A) A site plan which:

(i) Is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(ii) Is consistent with the number of buildings and building type/unit mix specified in the "Building/Unit Configuration" provided in the Application;

(iii) Identifies all residential and common buildings; and

(iv) Clearly delineates the flood plain boundary lines and shows all easements;

(B) Floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition. Adaptive Reuse Developments, are only required to provide building plans delineating each Unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition; and

(C) Unit floor plans for each type of Unit. The Net Rentable Areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" and "Building/Unit Configuration" provided in the Application. Adaptive Reuse Developments are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Unit types that vary in Net Rentable Area by 10% from the typical Unit.

(7) Development Costs, Corresponding Credit Request and Syndication Information.

(A) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period.

(B) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(C) If projected site work costs (excluding ineligible demolition costs) include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(8) Readiness to Proceed.

(A) Site Control. Evidence of Site Control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the thirty-six (36) months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided:

(i) A recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) A contract for lease (the minimum term of the lease must be at least forty-five (45) years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) A contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits by the same Development Owner, Applicant or Affiliate as indicated at pre-application. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2010 with option to extend through March 1, 2011 (Applications submitted for lottery) or ninety (90) days from the date of the Certificate of Reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered (Applications not submitted for lottery). The potential expiration of Site Control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting. Proof of consideration, as specified in the contract, must be submitted.

(iv) If the acquisition can be characterized as an identity of interest transaction, as described in §1.32 of this title (relating to Underwriting Rules and Guidelines) subclauses (I) - (III) of this clause must be provided:

(I) Documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement specifically indicating the asset value for the Development Site; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the Application;

(-a-) An appraisal meeting the requirements of paragraph (14)(D) of this section; and

(-b-) Any other verifiable costs of owning, holding, or improving the Property that, when added to the value from subclause (I) of this clause, justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense, capitalized costs of any physical improvements made to the property that benefit the proposed Development, the cost of rezoning, replatting and any off-site costs to provide utilities or improve access to the property that benefit the proposed Development. Additionally, an annual return of 10% may be applied to the original acquisition cost and documented holding and improvement costs; this return can be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the subject Development's award will be considered.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property, and the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the property and avoid foreclosure. Additionally, an annual return of 10% may be applied to the original acquisition cost and documented holding and improvement costs; this return can be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at which the subject Development's award will be considered. For any period of time during which the existing buildings are occupied or otherwise producing revenue, holding costs may not include operating expenses, including, but not limited to, property taxes and interest expense.

(III) In no instance will the acquisition cost utilized by the underwriter exceed the lesser of the original acquisition cost evidenced by subclause (I) of this clause plus costs identified in subclause (II)(-b-) of this clause, or the "as-is" value conclusion evidenced by subclause (II)(-a-) of this clause. The resulting acquisition cost will be referred to as the "identity of interest adjusted acquisition cost."

(B) Zoning. Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subpara-

graph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction, Adaptive Reuse or Reconstruction Developments, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction stating that:

(I) The Development is located within the boundaries of a Unit of General Local Government which does not have a zoning ordinance; and either subclause (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists;

(ii) For New Construction or Reconstruction Developments, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) The Applicant is in the process of seeking the appropriate zoning and has signed and provided to the Unit of General Local Government a release agreeing to hold the Unit of General Local Government and all other parties harmless in the event that the appropriate zoning is denied. (§2306.6705(5)(B)) Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice. No extensions may be requested to the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Developments, documentation of current zoning is required. If the property is currently a non-conforming use as presently zoned, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) A detailed narrative of the nature of non-conformance;

(II) The applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Financing Requirements.

(i) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to this chapter must be identified in the "Rent Schedule" and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the Housing Tax Credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in subclauses (I) - (IV) of this clause:

(I) Financing is in place as evidenced by:

(-a-) A valid and binding loan agreement; and

(-b-) Deed(s) of trust in the name of the Development Owner as grantor; or

(-c-) For TRDO-USDA §515 Developments involving, an executed TRDO-USDA letter indicating TRDO-USDA has received a notification of the tax credit Application; or

(II) Commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and includes the following as identified in items (-a-) - (-d-) of this subclause:

(-a-) Has been executed by the lender; and

(-b-) A minimum loan term of fifteen (15) years with at least a thirty (30) year amortization; and

(-c-) An expiration date; and

(-d-) All the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate, any required Guarantors, and anticipated developer fees paid during construction and anticipated deferred developer fees. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or

(III) Any federal, state or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(-a-) A term sheet or commitment from the lending agency which clearly describes the amount and terms of the funding must be submitted. If applying for points under §49.9(a)(5) of this chapter then documentation must be submitted as required by the deadlines stated therein; and

(-b-) Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an Application has been filed as required by the application checklist in the Tax Credit (Procedures) Manual; and

(IV) If the Development will be financed through more than 5% of Development Owner contributions, provide a letter from a Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period;

(ii) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application; and (§2306.6705(1))

(iii) Provide a term sheet or letter of commitment from a syndicator that, at a minimum, provides an estimate of the

amount of equity dollars expected to be raised for the Development in conjunction with the amount of Housing Tax Credits requested for allocation to the Development Owner, including pay-in schedules, anticipated developer fees paid during construction and anticipated deferred developer fees, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) Tax Assessment and Title. Provide the documents in clauses (i) and (ii) of this subparagraph:

(i) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the Development Site (unless the site is located on land that is not subject to federal, state or local property taxes); and

(ii) A copy of:

(I) The current title policy (or title status report if on Tribal Land) including a legal description which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(II) a current title commitment including a legal description, with the proposed insured matching the name of the Development Owner and the title of the Development Site vested in the name of the seller or lessor as indicated on the sales contract, option or lease;

(III) If the title policy, title status report, or commitment is more than six (6) months old as of the day the Application Acceptance Period closes, then a letter from the title company/Bureau of Indian Affairs indicating that nothing further has transpired on the policy, title status report or commitment must be provided.

(9) Notifications.

(A) Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in clauses (i) - (iii) of this subparagraph. Notification must not be older than three (3) months from the first day of the Application Acceptance Period. (§2306.6705(9)) If evidence of these notifications was submitted with the pre-application for the same Application and satisfied the Department's review of Pre-application Threshold, then no additional notification is required at Application. However, re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from pre-application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly or general). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three (3) months prior to the date the Volume III of the Application is submitted.

(i) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials as follows:

(I) No later than the Full Application Neighborhood Organization Request Date as identified in §49.3 of this chapter, the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(II) If no reply letter is received from the local elected officials by the Full Application Response to Neighborhood Organization Request Date, then the Applicant must certify to that fact in the certification form provided in the Application;

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the submission of the Application, in the certification form provided in the Application.

(ii) No later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of notification is required in the form of a certification provided in the Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in subclauses (I) - (IX) of this clause, in the event that the Department requires proof of notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph;

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the Governing Body of any municipality containing the Development;

(V) All elected members of the Governing Body of any municipality containing the Development;

(VI) Presiding officer of the Governing Body of the county containing the Development;

(VII) All elected members of the Governing Body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs (TDHCA);

(IV) Statement of whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted, as evidenced in the Certification of Notification provided in the Application, unless prohibited by local ordinance or code or restrictive covenants. Scattered site Developments must install a sign on each non-contiguous Development Site. The sign must identify that a residential development is being proposed and must provide contact information for the Applicant in the form of a phone number or web address where they can obtain more information. The Applicant shall make reasonable efforts to maintain the sign on the site until the day that the Board takes final action on the Application for the Development. In areas where the Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, evidence of the applicable ordinance or code or restrictive covenant must be submitted in the Application.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development Site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that it has notified each tenant at the Development of all the information otherwise required on the sign, including the Department's public hearing schedule for comment on submitted Applications.

(10) Development's Proposed Ownership Structure.

(A) A chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide for entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of name reservation of the entity name from the Texas Office of the Secretary of State.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2011 versions of these forms, as required in the Uniform Application, must be submitted. Units of General Local Government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) The experience certification, as further described under paragraph (4) of this section, is submitted that reflects a Person that appears in the organizational chart provided in subparagraph (A) of this paragraph.

(11) Development's Projected Income and Operating Expenses.

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties);

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement; (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate;

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph;

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to the Applicant's inability to provide all documentation as described:

(I) Submit at least one of the following:

(-a-) Historical monthly operating statements of the subject Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(-b-) The two (2) most recent consecutive annual operating statement summaries;

(-c-) The most recent consecutive six (6) months of operating statements and the most recent available annual operating summary;

(-d-) All monthly or annual operating summaries available; and

(II) A rent roll not more than six (6) months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and tenant names or vacancy;

(ii) A written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) For Qualified Elderly Developments, identification of the number of existing tenants qualified under the target population elected under this title;

(iv) A relocation plan outlining relocation requirements and a budget with an identified funding source; and (§2306.6705(6))

(v) If applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(12) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments. All Applications under the State Housing Credit Ceiling involving a nonprofit General Partner, regardless of whether the Nonprofit Set-Aside was selected, in which the Development will receive some financial or tax benefit for the involvement of the nonprofit General Partner, must submit all of the documents described in this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Tax-Exempt Bond Applications only need to submit the information in subparagraphs (A) and (B) of this paragraph.

(A) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity;

(B) The "Nonprofit Participation Exhibit" as provided in the Application;

(C) A Third Party legal opinion stating:

(i) That the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion; and

(ii) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling managing member; and otherwise meet the requirements of §42(h)(5) of the Code; and

(iii) That one of the exempt purposes of the nonprofit organization is to provide low-income housing; and

(iv) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board; and

(v) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(D) A copy of the nonprofit organization's most recent audited financial statement; and

(E) Evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(i) In this state, if the Development is located in a Rural Area; or

(ii) Not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(13) Authorization to Release Credit Information. The authorization to release credit information must be unbound and clearly labeled. An Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has an ownership interest of 10% or more in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(14) Supplemental Threshold Reports. The Third Party reports as required in this section must meet the requirements stated in subparagraphs (A) - (F) of this paragraph. The Environmental Site Assessment, Property Condition Assessment and Appraisal (if applicable) must be submitted on or before the Third Party Report Delivery Date as identified in §49.3 of this chapter. The Market Analysis Report must be submitted on or before the Market Analysis Delivery Date as identified in §49.3 of this chapter. If the entire report is not received by that time, the Application will be terminated and will be removed from consideration. A searchable electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name, and Development location are required.

(A) A Phase I Environmental Site Assessment (ESA) report (required for all Developments):

(i) Prepared by a qualified Third Party;

(ii) Dated not more than twelve (12) months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than twelve (12) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an

updated letter or updated report dated not more than three (3) months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report;

(iii) Prepared in accordance with §1.35 of this title (relating to Environmental Site Assessment Rules and Guidelines);

(iv) Developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements; and

(v) If the report includes a recommendation that an additional assessment be performed then a statement from the Applicant must be submitted with the Application indicating those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations then evidence indicating the mitigating recommendations have been carried out must be submitted at cost certification.

(B) A comprehensive Market Analysis report (required for all Developments):

(i) Prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §1.33 of this title (relating to Market Analysis Rules and Guidelines);

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the methodology prescribed in §1.33 of this title; and

(iv) For Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §1.34 of this title (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (§2306.67055, §42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report (required for Rehabilitation, Reconstruction and Adaptive Reuse Developments):

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period;

(iii) Prepared in accordance with §1.36 of this title (relating to Property Condition Assessment Guidelines); and

(iv) For Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §1.36 of this title.

(D) An appraisal report (required for Rehabilitation Developments and Identity of Interest transactions pursuant to §1.34 of this title):

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the §1.34 of this title; and

(iv) For Developments that require an appraisal from TRDO-USDA, the appraisal may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

§49.9. Selection Criteria.

(a) All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, do not round calculations. Points other than those provided in paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form. All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 130, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 226.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) Applications may qualify to receive a maximum of 28 points for this item. Receipt of feasibility points under this paragraph does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division, and, conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive all possible points under this paragraph. Evidence will include the following in addition to the commitment letter required under subsection §49.8(8)(C) of this chapter (relating to Threshold Criteria). To qualify for 20 points the supporting financial data shall include:

(A) A fifteen (15) year pro forma prepared by the permanent or construction lender:

(i) Specifically identifying each of the first five (5) years and every fifth year thereafter;

(ii) Specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) Indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen (15) years proposed for all third party lenders that require scheduled repayment; and

(B) A statement in the commitment letter, or other form deemed acceptable by the Department, indicating that the lender's assessment finds that the Development will be feasible for fifteen (15) years.

(C) For Developments maintaining existing financing from TRDO-USDA, a current note balance must be provided or other form of documentation of the existing loan deemed acceptable by the Department to meet the requirements of this section.

(D) To qualify for an additional 8 points, the commitment letter from the permanent or construction lender must indicate that they have reviewed the Applicant's financial position and credit worthiness and have determined that the Applicant meets the financial liquidity or net worth standards that such lender would require in connection with the proposed Development. Furthermore, the letter must describe those standards that such lender would require in connection with the proposed Development. If at any time the Application is under consideration by the Department and the lender changes, the Applicant must provide a subsequent letter from the new lender addressing net worth and liquidity under the new lender's standards in order to remain eligible for the additional 8 points.

(2) Quantifiable Community Participation. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development Site. It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under §49.8(9) of this chapter if the organization provides the information and documentation required in subparagraphs (A) and (B) of this paragraph. It is also possible that Neighborhood Organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring. If an organization is determined not to be qualified under this paragraph, the organization may qualify under paragraph (11)(B) of this subsection.

(A) Submission Requirements. Each Neighborhood Organization may submit the form as included in the QCP Neighborhood Information Packet that represents the organization's input. In order to receive a point score, the form must be received, by the Department, or postmarked, if mailed by the U.S. Postal Service, no later than the Quantifiable Community Participation Delivery Date as identified in §49.3 of this chapter (relating to Program Calendar). Forms received after the deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The form must:

(i) State the name and location of the proposed single Development;

(ii) Certify that the letter is signed by two officials or board members of the Neighborhood Organization with the authority to sign on behalf of the Neighborhood Organization, and include:

(I) the street and/or mailing addresses for the signers of the letter;

(II) day and evening phone numbers for the signers of the letter;

(III) email addresses and/or facsimile numbers for the signers of the letter and one additional contact for the organization; and

(IV) a written description and map of the organization's geographical boundaries;

(iii) Certify that the organization has boundaries, and that the boundaries in effect on or before the Full Application Delivery Date identified in §49.3 of this chapter contain the proposed Development Site;

(iv) Certify that the organization meets the definition of "Neighborhood Organization"; defined as an organization of persons living near one another within the organization's defined boundaries that contain the proposed Development Site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood (§2306.004(23-a)). For purposes of this section, "persons living near one another" means two (2) or more separate residential households. "Neighborhood Organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or Reconstruction of the property occupied by the residents. "Neighborhood Organizations" do not include broader based "community" organizations;

(v) Include documentation showing that the organization is on record as of the Full Application Delivery Date with the state or county in which the Development is proposed to be located. The receipt of the QCP form that meets the requirements of this subsection and further outlined in the QCP Neighborhood Information Packet will constitute being on record with the State. The Department is permitted to issue an Administrative Deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state;

(vi) A Neighborhood Organization must take reasonable measures to provide notice to persons eligible to join or participate in the affairs of the organization of that right. Examples of reasonable measure would be giving notice in a newsletter distributed where residents will likely see them; posting notice (in compliance with local signage requirements); or distribution flyers. The Department may exclude from consideration Neighborhood Organizations that do not comply with their own bylaws or other constitutive or governing documents;

(vii) While not required, the organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the Developer or Applicant to this meeting; and

(viii) The form from the Neighborhood Organization for the purposes of this subsection must be submitted to the Department by the Neighborhood Organization and not the Applicant. This documentation must be submitted independent of the Application. Furthermore, while the Applicant may assist the Neighborhood Organization in the Administrative Deficiency process or any other request from the Department as it relates to this item, the Administrative Deficiency Notice from the Department will be issued to the Neighborhood Organization with a copy to the Applicant; however, the Deficiency response

must be submitted to the Department directly by the Neighborhood Organization.

(B) Scoring. The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will be based on the following:

(I) Support letters (must establish at least one reason for support) will receive 24 points; or

(II) Letters that do not establish a reason for support or opposition or that are unclear will be considered ineligible and scored as neutral (+12 points);

(III) Applications for which no letters from Neighborhood Organizations are scored will receive a neutral score of +12 points;

(IV) Opposition letters (must state at least one reason for opposition) will receive 0 points;

(V) If an Application receives multiple eligible letters, the average score of all eligible letters will be applied to the Application.

(ii) The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and Neighborhood Organizations for more information. The Department may consider any relevant information specified in letters from other Neighborhood Organizations regarding a Development in determining a score.

(iii) The Department highly values quality public input addressed to the merits of a Development. Input that identifies matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(3) The Income Levels of Tenants of the Development. (§§2306.111(g)(3)(B); 2306.111(g)(3)(E); 2306.6710(b)(1)(C); 2306.6710(e); and §42(m)(1)(B)(ii)(I)) Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (C) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level (must round to the next highest whole Unit, no less than one Unit). The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code.

(A) 22 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI; or

(B) 20 points if at least 60% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI.

(C) 18 points if at least 10% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(4) The Size and Quality of the Units (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)). Applications may qualify to receive up to 20 points under both subparagraphs (A) and (B) of this paragraph.

(A) Size of the Units (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Developments proposing Single Room Occupancy without meeting these square footage minimums if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) 600 square feet for an Efficiency Unit;

(ii) 700 square feet for a one Bedroom Unit that is not in a Qualified Elderly Development; 600 square feet for a one Bedroom Unit in a Qualified Elderly Development;

(iii) 950 square feet for a two Bedroom Unit that is not in a Qualified Elderly Development; 750 square feet for a two Bedroom Unit in a Qualified Elderly Development;

(iv) 1,050 square feet for a three Bedroom Unit; and

(v) 1,250 square feet for a four Bedroom Unit.

(B) Quality of the Units (14 points). Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xvi) of this subparagraph. Applications involving scattered site Developments must have all of the Units located with a specific amenity to count for points. Applications involving Rehabilitation (excluding Reconstruction) or Single Room Occupancy may receive 1.5 points for each point item (do not round).

(i) Covered entries (1 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Refrigerator with icemaker (1 point);

(vi) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets - does not need to be in the Unit but must be on the property site (1 point);

(vii) Laundry equipment (washers and dryers) for each individual Unit including a front loading washer and dryer in required UFAS compliant Units (3 points);

(viii) Thirty (30) year architectural shingle roofing (1 point);

(ix) Covered patios or covered balconies (1 point);

(x) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xi) 100% masonry on exterior (3 points) (Applicants may not select this item if clause (xii) of this subparagraph is selected);

(xii) Greater than 75% masonry on exterior (1 point) (Applicants may not select this item if clause (xi) of this subparagraph is selected);

(xiii) Structural Insulated Panel construction with wall insulation at a minimum of R-20 and roof at a minimum R-30 (3 points);

(xiv) R-15 Walls / R-30 Ceilings (rating of wall/ceiling system) (3 points);

(xv) 14 SEER HVAC (or greater) or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and Reconstruction or radiant barrier in the attic for Rehabilitation (excluding Reconstruction) (3 points); or

(xvi) High Speed Internet service to all Units (2 points).

(5) The Commitment of Development Funding by Governmental Instrumentality. (§2306.6710(b)(1)(E)) Applications may qualify to receive up to 18 points under this paragraph.

(A) Submission Requirements. Evidence of the following must be submitted in accordance with the application checklist in the Tax Credit (Procedures) Manual.

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the total number of Units in the Development.

(ii) An Applicant may submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form.

(iii) An Applicant may substitute any source in response to an Administrative Deficiency Notice or after the Application has been submitted to the Department.

(iv) A loan does not qualify as an eligible source unless it has a minimum term of the later of 1-year or the Placed in Service date, and the interest rate must be at the Applicable Federal Rate (AFR) or below (at the time of loan closing).

(v) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to §49.8(8)(A) of this chapter to qualify. The value of in-kind contributions may only include the time period between award or August 2, 2011 and the Development's Placed in Service date, with the exception of contributions of land. The full value of land contributions, as established by the appraisal required pursuant to clause (viii) of this subparagraph will be counted. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(vi) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the date the Application Acceptance Period ends, is submitted with the Application from the Governing Body of the Unit of General Local Government authorizing the Applicant to act on behalf of the Governing Body of the Unit of General Local Government in applying for HOME Funds from TDHCA for the particular Application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance Period ends and a resolution is submitted with the substitution documentation from the Governing Body of the Unit of General Local Government authorizing the Applicant to act on behalf of the Unit of General Local Government in applying for HOME Funds from TDHCA for the particular Application.

(vii) Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract remaining as of December 31st of the application year is submitted from the Governmental Instrumentality. The value of the contract does not include past subsidies.

(viii) Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity; or a letter from the funding entity indicating that the award of funds with respect to the funding cycle for which the Applicant intends to apply for will be made by August 1, 2011. This letter does not have to confirm that the funds will be awarded to the subject Application, but that awards with respect to the Applications under consideration for the funding cycle will be announced by the previously stated deadline. A statement from the Applicant with respect to the loan amount to be applied for and the specific terms requested or to be requested must be submitted. For in-kind contributions, evidence must be submitted in the Application from the Unit of General Local Government substantiating the value of the in-kind contributions. For in-kind contributions of land, evidence of the value of the contribution must be in the form of an appraisal.

(ix) If not already provided, at the time the executed Commitment is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the Unit of General Local Government, or its designee or agent, for the Development Funding to the Department. If the funding commitment from the Governmental Instrumentality has not been received by the date the Department's Commitment is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the Governmental Instrumentalities Development Funding, the Commitment will be rescinded and the credits reallocated.

(x) Funding commitments from a Governmental Instrumentality will not be considered final unless the Governmental Instrumentality attests to the fact that any funds committed were not first provided to the Governmental Instrumentality by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Governmental Instrumentality or subsidiary.

(B) Scoring. Points will be determined on a sliding scale based on the amount of funds to be made available to the De-

velopment on a per unit basis, based on the total number of Units in the Development. Do not round for the following calculations. The "total contribution" is the total combined value of qualifying loan(s), grants or in-kind contributions from a Governmental Instrumentality pursuant to subparagraph (A) of this paragraph.

(i) A total contribution of at least $900 (or $450 for Rural Developments or Developments located in non-participating jurisdictions) per unit receives 6 points; or

(ii) A total contribution of at least $2,250 (or $1,125 for Rural Developments or Developments located in non-participating jurisdictions) per unit receives 12 points;

(iii) A total contribution equal to or greater than $4,500 (or $2,250 for Rural Developments or Developments located in non-participating jurisdictions) per unit receives 18 points.

(6) Community Support from State Representative or State Senator. (§2306.6710(b)(1)(F) and §2306.6725(a)(2)) Applications may qualify to receive 14 points for this item. Letters must identify the specific Development, must clearly state support for or opposition to the specific Development and must be from the State Representative or State Senator that represents the district containing the proposed Development Site. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator on or before the Input from State Senator or Representative Delivery Date as identified in §49.3 of this chapter. A State Representative or State Senator may withdraw (in writing), but may not change or replace a letter that is submitted by the April 1st deadline on or before the Withdraw Deadline for State Senator or Representative Letters as identified in §49.3 of this chapter but may not submit a new letter. After the Withdraw Deadline such letters may not be withdrawn. The previous position of support or opposition that is withdrawn will be scored as neutral (0 points). State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the Application is submitted. Letters of support from State Representatives or Senators that do not represent the district containing the proposed Development Site will not qualify for points under this exhibit. Support letters are +14 points; neutral letters, or letters that do not specifically refer to the Development, will receive 0 points; Opposition letters (must state reason for opposition) will receive -14 points. If one letter is received in support and one letter is received in opposition the score would be 0 points. A letter that does not directly express support but expresses it indirectly by inference, (i.e. "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(7) The Rent Levels of the Units. (§2306.6710(b)(1)(G)) Applications may qualify to receive up to 12 points for this item provided the Application has qualified for points under paragraph (3) of this subsection, relating to Income Levels of Tenants of the Development. An Application may qualify for points under this subsection by providing additional Low-Income Units at 30% and 50% of AMGI (must round up to the next whole Unit, not less than one Unit), as follows:

(A) An Application may receive 2 points for every 5% of Low-Income Units at rents and incomes at 50% of AMGI; or

(B) An Application may receive 6 points for every 2.5% of Low-Income Units at rents and incomes at 30% of AMGI.

(8) The Cost of the Development by Square Foot. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) Applications may qualify to receive 10 points for this item. For this exhibit, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development with an elevator or a high rise building with four or more stories serving any population, the NRA may include elevator served interior corridors. If the proposed Development is a Single Room Occupancy Development, the NRA may include elevator served interior corridors and may include up to 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $95 per square foot for Qualified Elderly, single family design, transitional, and Single Room Occupancy Developments (transitional housing for the homeless and Single Room Occupancy units as provided in §42(i)(3)(B)(iii) and (iv) of the Code), unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot; and $85 for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $87 per square foot. The First Tier counties are identified in the Tax Credit (Procedures) Manual. There are also specifically designated First Tier communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development Site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte.

(9) Tenant Services. (§2306.6710(b)(1)(I) and §2306.6725(a)(1)) Applications may qualify to receive up to 8 points for this item. The Applicant must certify that the Development will provide a combination of supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The same service may not be used for more than one scoring item. Applications will be awarded points for selecting services listed in subparagraphs (A) - (U) of this paragraph:

(A) Joint use library center, as evidenced by a written agreement with the local school district (2 points);

(B) Weekday afterschool program (shall include at least on a monthly basis a curriculum based character building presentation on relevant topics (i.e. teen dating violence, drug prevention, team-building, internet dangers, stranger danger, etc.)) (3 points);

(C) Daily transportation (2 point);

(D) Counseling services (only Supportive Housing Developments eligible) (1 point);

(E) Food pantry/common household items (only Supportive Housing Developments eligible) (1 point);

(F) GED preparation classes (shall include a certified instructor providing on-site coursework and exam) (2 points);

(G) English as a second language classes (shall include a certified instructor providing on-site coursework and exam) (2 points);

(H) Quarterly financial planning courses (i.e. home-buyer education, credit counseling, investing advice, retirement plans,

etc.). Courses must be offered through an on-site instructor; a CD-Rom course is not acceptable (1 point);

(I) Annual health fair (1 point);

(J) Quarterly health and nutritional courses (1 point);

(K) Organized team sports programs or youth programs (1 point);

(L) Scholastic tutoring (1 point);

(M) Notary Public Services during regular business hours (§2306.6710(b)(3)) (1 point);

(N) Weekly exercise classes (2 points);

(O) Monthly arts and crafts (1 point);

(P) Annual income tax preparation services (1 point);

(Q) Monthly transportation to community/social events (i.e. lawful gaming sites, mall trips, community theatre, bowling, organized tours, etc.) (1 point); and

(R) Monthly on-site social events (i.e. potluck dinners, game night, etc.) (1 point);

(S) Specific and pre-approved caseworker services for seniors and Persons with Disabilities (1 point);

(T) Home chore services (such as trash removal and quarterly preventative maintenance including light bulb replacement and hot water heater and other appliance check) for seniors and Persons with Disabilities (1 point);

(U) 1 point for any other programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(10) Declared Disaster Areas. (§2306.6710(b)(1)) Applications may receive 7 points, if by the Full Application Delivery Date as identified in §49.3 of this chapter or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared a disaster under Texas Government Code §418.014.

(11) Community Input other than Quantifiable Community Participation. If an Application was awarded 18 or 12 points under paragraph (2) of this subsection, then that Application may receive up to 6 points for letters that qualify for points under subparagraph (A), (B) or (C) of this paragraph. An Application may not receive points under more than one of the subparagraphs (A) - (C) of this paragraph. All letters must be submitted within the Application. At no time will the Application receive a score lower than zero for this item.

(A) An Application may receive two points (maximum of 6 points) for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located including, but not limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development will not be counted. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; a PTA or PTO would qualify. Should an Applicant elect this option and the Application receives letters in opposition, then 2 points will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community.

(B) An Application may receive 6 points for a letter of support, from a property owners association created for a master planned community whose boundaries include the Development Site that does not meet the requirements of a Neighborhood Organization for points under paragraph (2) of this subsection.

(C) An Application may receive 6 points for a letter of support from a Special Management District, whose boundaries, as of the Full Application Delivery Date as identified in §49.3 of this chapter, include the Development Site and for which there is not a Neighborhood Organization on record with the county or state.

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)) Applications may qualify to receive up to 6 points (if the Development Site is located in a Place with a certain Affordable Housing Need Score). Each Application may receive a score if correctly requested in the Self Score form based on objective measures of housing need in the Place where the Development is located. This Affordable Housing Need Score for each Place will be published in the 2011 Site Demographic Characteristics Report. For purposes of this item a Place is defined as the geographic area contained within the boundaries of:

(A) An incorporated place; or

(B) Census Designated Place (CDP) as established by the U.S. Census Bureau for the most recent Decennial Census. For Developments located outside the boundaries of an incorporated place or CDP, the Development shall take up the Place characteristics of the incorporated place or CDP whose boundary is nearest to the Development Site.

(13) Community Revitalization, (§42(m)(1)(C)(iii)) Historic Preservation or Rehabilitation. Applications may qualify to receive 6 points under subparagraphs (A) - (C) of this paragraph or 3 points under subparagraph (D) of this paragraph.

(A) The Development includes the use of an Existing Residential Development and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan must be in the form of a letter from the Appropriate Local Official stating there is a Community Revitalization Plan in effect and the Development is within the area covered by the plan or only if the Community Revitalization Plan has specific boundaries, a copy of the plan, adopted by the jurisdiction or its designee and a map showing that the Development is within the area covered by the Community Revitalization Plan; or

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including Reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence

will include proof of the historic designation from the appropriate Governmental Entity.

(C) Rehabilitation (includes Reconstruction). Applications proposing to build solely Rehabilitation (excluding New Construction of non-residential buildings), solely Reconstruction (excluding New Construction of non-residential buildings), or solely Adaptive Reuse;

(D) The Development is New Construction and is proposed to be located in an area that is part of a Community Revitalization Plan (3 points).

(14) Pre-application Participation Incentive Points. (§2306.6704) Applicants that submitted a pre-application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) Be for the identical Development Site, or reduced portion of the Development Site as the proposed Development Site under control in the pre-application;

(B) Have met the Pre-application Threshold Criteria;

(C) Include, as part of this exhibit, a certification signed by the Principal(s) that signed the site control at pre-application confirming they are the same Principal(s) at Application.

(D) Be serving the same target population (general or elderly) as in the pre-application;

(E) Be applying for the same Set-Asides as indicated in the pre-application (Set-Asides can be dropped between pre-application and Application, but no Set-Asides can be added); and

(F) Be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at pre-application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (11) of this subsection. The Application score used to determine whether the Application score is 5% greater or less than the number of points awarded at pre-application will also include all point losses under §49.7(a)(2)(A) of this chapter (relating to Administrative Deficiencies). An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) To request the pre-application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from pre-application to Application; or

(ii) To request that the pre-application points be forfeited and that the Department evaluate the Application as requested in the Self-Score Form.

(15) Green Building Amenities. Application may qualify to receive up to 6 points for this item provided that points under this paragraph are not being requested for the same items utilized for points under §49.8(5)(A) of this chapter. Rehabilitation Developments (excluding Reconstruction) and Single Room Occupancy Developments will receive 1.5 points for each point requested under this paragraph.

(A) Development Energy Savings (1 point for each item):

(i) at least 50% of the water needed annually for site irrigation is from a rain water harvesting/collection system and/or locally approved gray water collection system; or

(ii) native trees and plants installed that are appropriate to the site's soils and microclimate and located to allow for shading in the summer and heat gain in the winter; or

(B) Tenant Energy Savings (2 points for each item):

(i) If the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(ii) If the east-west axis of the building oriented within 15 degrees of due east-west utilizes a narrow floor plate (less than 40 feet), and single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation;

(iii) Solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, (applies only to rehabilitation where windows are not replaced with Energy Star rated windows);

(iv) 100% of HVAC condenser units are located so they are fully shaded 75% of the time during summer months (May through August);

(v) Install low-flow or high efficiency toilets that exceed State requirements;

(vi) Install bathroom lavatory faucets, showerheads and kitchen faucets that exceed the State standard at the time of Application. All fixtures throughout development must meet the standard. Rehabilitation Developments may install compliant faucet aerators instead of replacing entire faucets; or

(vii) Provide Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire Development;

(viii) Sub-metered utility meters for any utility in a Rehabilitation Development which was not already sub-metered at the time of Application;

(ix) If the Development includes Energy-Star qualified windows and glass doors exclusively; and insulation, and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and Energy Star rated HVAC and domestic hot water heaters, and insulation that exceeds Energy Star standards;

(x) If the Development promotes energy efficiency by demonstrating a certified HERS score of 85 or lower;

(xi) Thermally and draft efficient doors (SHGC of 0.40 or lower (for doors with glass) and U-value specified by climate zone according to the 2006 IECC) are used;

(xii) On-site photovoltaic panels or wind-driven turbines for generating at least 5kW of electricity that are incorporated into the engineered structural design of the roof(s) and neither of which protrude from any roof structure by more than 8 feet and are designed and wired to supplement the Development's electric power. Photographs and data sheets of the proposed equipment must be submitted with the Application; or

(xiii) Recycling service provided throughout the compliance period.

(C) Other Green Features/Indoor Health (1 point for each item):

(i) Renewable materials, provide at least one of the following: bamboo flooring, wool carpet, linoleum flooring, straw board cabinetry, poplar OSB, or cotton batt insulation;

(ii) Healthy flooring, provide at least one of the following for 50% of flooring. Finished concrete or ceramic tile resilient flooring material that is Floor Score Certified, applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty; or

(iii) Healthy finish materials, use paints, stains, adhesives and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standards.

(D) LEED (Leadership in Energy and Environmental Design) Certification. (6 points) If at the time of Cost Certification a LEED Certification (Certified, Silver, Gold or Platinum levels) for the Development is obtained then the maximum points allowed under this paragraph will be awarded and none of the green building amenities selected under this paragraph will need to be substantiated. Conversely, if at the time of Cost Certification a LEED Certification has not been obtained then the Applicant will be required to prove up 6 points under this subparagraph.

(16) Development Location. (§2306.6725(a)(4); §42(m)(1)(C)(i)) Applications may qualify to receive 4 points under this item. Evidence must not be more than six (6) months old from the first day of the Application Acceptance Period. An Application may only receive points under one of the subparagraphs (A) - (E) of this paragraph.

(A) The Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census) that is higher than the median family income for the county in which the census tract is located. This comparison shall be made using the most recent data available to the Department as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county. These Census Tracts are outlined in the 2011 Housing Tax Credit Site Demographic Characteristics Report.

(B) The proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. An elementary attendance zone does not include magnet school or elementary schools with district-wide possibility of enrollment or no defined attendance zones. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (§42(m)(1)(C)(vii))

(C) The proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. (§42(m)(1)(C)(vii)) These Census Tracts are outlined in the 2011 Housing Tax Credit Site Demographic Characteristics Report.

(D) The proposed Development is located in an urban core, on a site where the proposed use is not prohibited by the Unit of General Local Government via ordinance or regulation. For purposes of this item, an urban core is defined as a compact and contiguous geographical area that is located in a Metropolitan Statistical Area within the city limits with a population of no less than 150,000 composed of adjacent block groups of which is zoned to accommodate a mix of medium or high density residential and commercial uses and at least 50% of such land is actually being used for such purposes based on high density residential structures and/or commercial structures already constructed. Evidence must be submitted in the form of zoning maps and a certification provided in the Application.

(E) The proposed Development is located in a high opportunity area as identified in §49.5(d)(3)(D)(i) - (iii) of this chapter (relating to Site and Development Restrictions).

(17) Economic Development Initiatives. An Application may qualify to receive 4 points under subparagraphs (A) - (C) of this paragraph. For the purpose of this paragraph, "area" shall mean the boundaries of any zone or community in subparagraph (A) of this paragraph or the area in which funds in subparagraph (B) of this paragraph must be used:

(A) A Designated State or Federal Empowerment/Enterprise Zone, Urban Enterprise Community, or Urban Enhanced Enterprise Community. To be eligible for these points, Applicants must submit a letter and a map of the zoned area from a city/county official stating that the proposed Development is located within such a designated zone or area. The letter should be no older than six (6) months from the first day of the Application Acceptance Period (§2306.127); or

(B) An area that has received an award within the three year period prior to the beginning of the Application Acceptance Period, from the Texas Capital Fund, Texas or Federal Enterprise Zone Fund, Texas Leverage Fund, Industrial Revenue Bond Program, Emerging Technologies, Skills Development, Rural Business Enterprise Grants, Certified Development Company Loans, or Micro Loan Program or other state or federally funded economic development initiatives approved by the Department (This excludes limited highway improvement and roadwork projects, but does include broader regional transportation initiatives targeted to expanding economic development); or

(C) A geographical area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD at the time of Application submission (these census tracts are designated in the 2011 Housing Tax Credits Site Demographics Characteristics Report (§2306.127); or

(D) Points under subparagraphs (A), (B) and (C) of this paragraph will not be granted if more than 3 Developments received an award of Housing Tax Credits in the applicable area in the seven (7) years prior to the beginning of the Application Acceptance Period. The Applicant must provide receipt of funds to the area by evidence of a map of the designated area for such funding and documentation of the recipient of the award of funds or a letter from the entity granting such funds stating that funds were awarded in the designated area.

(18) Developments in Census Tracts with No Other Existing Same Type Developments Supported by Tax Credits. (§2306.6725(b)(2)) Applications may receive 4 points if the proposed Development is located in a census tract in which there are no other existing Developments supported by Housing Tax Credits that serve the same type of household, regardless of whether the Development serves the general or elderly populations. Evidence of the census tract in which the Development is located must be submitted. These census tracts are outlined in the 2011 Housing Tax Credit Site Demographic Characteristics Report.

(19) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) Applications may qualify to receive 4 points for this item. The Department will award these points to Applications in which at least 5% of the Units are set aside for Persons with Special Needs. For purposes of this section, Persons with Special Needs is

defined as persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. The twelve-month period will begin on the date each building receives its Certificate of Occupancy. For buildings that do not receive a Certificate of Occupancy, the twelve-month period will begin on the placed in service date as provided in the Cost Certification manual. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(20) Length of Affordability Period. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) Applications may qualify to receive up to 4 points. In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the thirty (30) years required in the Code may receive points as follows:

(A) Add five (5) years of affordability after the extended use period for a total affordability period of thirty-five (35) years (2 points); or

(B) Add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years (4 points).

(21) Site Characteristics. Development Sites, including scattered sites, may qualify to receive up to 4 points for this item. Developments Sites must be located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three (3) services appropriate to the target population. A site located within one-quarter mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has another form of transportation, including, but not limited to, special transit service or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or funding a comparable service, then this will be a requirement of the LURA. Only one service of each type listed in subparagraphs (A) - (L) of this paragraph will count towards the points. A map must be included identifying the Development Site and the location of the services by name. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be under active construction, post pad by the date the Application is submitted.

(A) Full service grocery store or supermarket.

(B) Pharmacy.

(C) Convenience Store/Mini-market.

(D) Department or Retail Merchandise Store.

(E) Bank/Credit Union.

(F) Restaurant (including fast food).

(G) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(H) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(I) Hospital/medical clinic.

(J) Medical offices (physician, dentistry, optometry).

(K) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(L) Senior Center.

(22) Development Size. The Development consists of not more than 36 Units (3 points).

(23) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item. Qualifying under subparagraph (A) of this paragraph shall be worth 1 point and qualifying under subparagraph (B) of this paragraph shall be worth 2 points. (§42(m)(1)(C)(iv))

(A) The Applicant has submitted a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609; or

(B) There is a HUB as certified by the Texas Comptroller of Public Accounts, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Comptroller of Public Accounts that the Person is a HUB at the close of the Application Acceptance Period.

(24) Qualified Census Tracts with Revitalization. (§42(m)(1)(B)(ii)(III)) Applications may qualify to receive 1 point for this item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan must be in the form of a letter from the Appropriate Local Official stating there is a Community Revitalization Plan in effect and the Development is within the area covered by the plan or only if the Community Revitalization Plan has specific boundaries, a copy of the plan, adopted by the jurisdiction or its designee and a map showing that the Development is within the area covered by the Community Revitalization Plan.

(25) Developments Intended for Eventual Tenant Ownership--Right of First Refusal. Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) The Development Owner's determination to sell the Development; or

(ii) The Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two (2) years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) During the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 CFR §92.1 (a "CHDO") and is approved by the Department;

(ii) During the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) During the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department;

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) The end of the Compliance Period; or

(ii) Two (2) years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of one hundred twenty (120) days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(26) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (§2306.6725(a)(3)) Funding sources used for points under paragraph (5) of this subsection may be used for this point item; however, funding amounts may not be duplicative.

(A) Evidence must be submitted in the Application that the proposed Development has received or will receive loan(s), grant(s) or in-kind contributions from a private, state or federal resource, which include Capital Grant Funds and HOPE VI funds, that is equal to or greater than 2% (do not round) of the Total Housing Development Costs reflected in the Application.

(B) For in-kind contributions, evidence must be submitted in the Application from a private, state or federal resource which substantiates the value of the in-kind contributions. Development based rental subsidies from private, state or federal resource may qualify under this section if evidence of the remaining value of the contract is submitted from the source. The value of the contract does not include past subsidies.

(C) Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(D) Applicants may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, two sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, two sources may not be submitted if each source is for an amount equal to 2% of the Total Housing Development Cost.

(E) The funding must be in addition to the primary funding (construction and permanent loans) that is proposed to be utilized and cannot be issued from the same primary funding source or an affiliated source. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Unit of General Local Government.

(F) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the

executed Commitment is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source, identified in the Application, or qualifying substitute source, has not been received by the date the Department's Commitment is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private, state or federal source, the Commitment will be rescinded and the credits reallocated. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA.

(G) To qualify for this point, the Rent Schedule must show that at least 3% (not using normal rounding) of all Low-Income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(27) Third Party Funding Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (§2306.6710(e)(1)) Evidence that the proposed Development has documented and committed Third-Party funding sources and the Development is located outside of a Qualified Census Tract serving 10% of households at 30% AMGI or less. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the Third-Party funding source and must be equal to or greater than 2% (do not round) of the Total Development Costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. Funding sources and amounts used for points under paragraph (5) of this subsection may not be used for this point item.

(28) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of the Carryover or 10% Test deadline, and did not meet the original submission deadline, relating to Developments receiving a Housing Tax Credit Commitment made in the Application Round preceding the current round. For each extension request made, unless the person approving the extension (the Board or the Executive Director, as applicable) makes an affirmative finding setting forth that the facts which gave rise to the need for the extension were beyond the reasonable control of the Applicant and could not have been reasonably anticipated, the Applicant will receive a 5 point deduction. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to §49.12(a) of this chapter (relating to Post Award Activities).

(b) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation or Reconstruction of existing Units will win this first tier tie breaker over Applications involving solely New Construction or Adaptive Reuse.

(B) The Application located in the municipality or, if located outside a municipality, the county that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per square foot of Net Rentable Area (the lower credits per square foot has preference).

(D) Developments that are intended for eventual tenant ownership. Such Developments must utilize a detached single family site plan and building design and have a business plan describing how the Development is intended to convert to tenant ownership at the end of the 15-year compliance period.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §49.8(2)(B) of this chapter (relating to One Mile Three Year Rule), and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the Certificate of Reservation docket number issued by the Texas Bond Review Board (TBRB) in making its determination. When two Competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a Competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their Certificate of Reservation from the TBRB on or before April 29, 2011 will take precedence over the Housing Tax Credit Applications in the 2011 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2011 will take precedence over the Tax-Exempt Bond Developments that received their Certificate of Reservation from the TBRB on or between May 2, 2011 and July 29, 2011; and

(C) After July 29, 2011, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the 2011 Application Round on the waiting list. However, if no Certificate of Reservation has been issued by the date the Board approves an allocation to a Development from the waiting list of Applications in the 2011 Application Round or a forward commitment, then the waiting list Application or forward commitment will be eligible for its allocation.

(c) Staff Recommendations. (§2306.1112 and §2306.6731) In accordance with the QAP and other applicable Department rules, the Department staff shall make its recommendations to the Executive

Award and Review Advisory Committee. Recommendations of staff to the Board will be the recommendations of that Committee except as otherwise disclosed.

(d) Tax Credits Financed Under American Recovery and Reinvestment Act of 2009. (§2306.6736)

(1) To the extent the Department receives federal funds under the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) or any subsequent law (including any extension or renewal thereof) that requires the Department to award the federal funds in the same manner and subject to the same limitation as the awards of the housing tax credits, the following provisions apply.

(2) Any reference in this chapter to the administration of the housing tax credit program shall apply equally to the administration of such federal funds except:

(A) the Department may, as approved by the Board, establish a separate application procedure for such funds, outside of the uniform application cycle referred to in §2306.111, Texas Government Code, and the deadlines established in §2306.6724, Texas Government Code, and any reference herein to the application period shall refer to the period beginning on the date the Department begins accepting applications for such funds and continuing until all such available funds are awarded;

(B) unless reauthorized, this section is repealed on August 31, 2011.

§49.11. Tax-Exempt Bond Developments.

(a) Filing of Applications. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2011 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 30, 2010. Such filing must be accompanied by the Application fee described in §49.14 of this chapter (relating to Program Related Fees);

(2) Applicants which receive advance notice of a Program Year 2011 Certificate of Reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §49.14 of this chapter prior to the Applicant's Certificate of Reservation date as assigned by the TBRB. Those Applications designated as Priority 3 by the TBRB must submit Volumes I and II within fourteen (14) days of the Certificate of Reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least sixty (60) days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department staff will have limited discretion to recommend an Application with appropriate justification of the late submission;

(3) Multiple site applications will be considered to be one Application as identified in Chapter 1372, Texas Government Code.

(b) Applicability of Rules. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §49.4(c)(12) of this chapter (relating to One Mile Same Year Rule); §49.5(b) of this chapter (relating to Credit Amount); §49.6 of this chapter (relating to Allocation Process); §49.7(b), (c) and (d) of this chapter (relating to Pre-application); §49.7(g) of this chapter (relating to Methodology for Awards); §49.7(k) of this chapter (relating to Rural Rescue Applications); §49.9(a) of this chapter (relating to Selection Criteria); §49.10(b) and (c) of this chapter (relating to Waiting List and Forward Commitments); and §49.12(e) - (g) of this chapter (relating to Carryover, 10% Test and Substantial Construction).

(c) Tenant Services. Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of supportive services that would otherwise not be available for the tenants. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The provision of these services will be included in the LURA. Acceptable services include those described in §49.9(a)(9) of this chapter.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Section 42(m)(2)(D), Internal Revenue Code, requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the §1.32 of this title (relating to Underwriting Rules and Guidelines), or request that the Department perform the function. If the issuer underwrites the Development, the Department may request such underwriting report and may upon review make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by §42(m)(2)(D) of the Code. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director and are subject to the Credit Increase Fee as described in §49.14 of this chapter.

(e) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the Certificate of Reservation expiration date, and subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the TBRB and one of the following must apply:

(1) The new docket number must be issued in the same program year as the original docket number and must not be more than four (4) months from the date the original application was withdrawn from the TBRB. The application must remain unchanged. This means that at a minimum, the following cannot have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or TBRB priority status including the effect on the inclusive capture rate. Note that the entities

involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §49.8(9) of this chapter (relating to Threshold Criteria) are not required to be reissued. A revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number; or

(2) If there are changes to the Application as referenced in paragraph (1) of this subsection or if there is public opposition, the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new Determination Notice to be issued.

§49.13. Board Reevaluation (§2306.6731(b)).

(a) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be based on those items identified in subsection (b)(4) of this section. The Board may revoke any Commitment or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of Housing Tax Credits, or if the Applicant has altered any Selection Criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request shall include a proposed form of amendment, if requested by the Department, and the applicable fee as identified in §49.14(l) of this chapter (relating to Extension and Amendment Fees). The amendment request will not be considered received unless accompanied with the corresponding fee.

(2) The Executive Director of the Department shall require appropriate Department staff to evaluate the amendment and provide a written analysis and recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with subsection (h) of this section shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments not requiring Board approval, the amendment will be deemed approved if the Executive Director does not approve or deny within thirty (30) days from the date on which the Department has acknowledged it has received all additional information that it has, in writing, requested of the Applicant to enable the Department to evaluate the amendment request. Amendment requests which require Board approval must be received by the Department at least forty-five (45) days prior to the Board meeting in which the amendment will be considered.

(3) The Board must vote whether to approve an amendment that is material. The Executive Director may administratively approve all non-material amendments. The Board may vote to reject an amendment request and if appropriate, rescind a Commitment or terminate the allocation of Housing Tax Credits and reallocate the credits to other Applicants on the waiting list. Amendment requests may be denied if the Board determines that the modification proposed in the amendment:

(A) Would materially alter the Development in a negative manner; or

(B) Would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of units or bedroom mix of units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the units or common areas;

(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of the Development of at least 5%;

(G) An increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) Any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, Department staff shall consider whether the need for the proposed modification was:

(A) Reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) Preventable by the Applicant. Amendment requests will be denied if the circumstances were reasonably foreseeable and preventable unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment Notice issuance, as approved by the Board, the following procedure will apply:

(A) For amendments that involve a reduction in the total number of Low-Income Units being served, or a reduction in the number of Low-Income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from the

Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development; and

(B) If it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for twenty-four (24) months from the time that the amendment is approved.

(c) Extension Requests. All extension requests relating to the Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable extension fee as identified in §49.14(l) of this chapter. Such requests must be submitted to the Department no later than the date for which an extension is being requested. All requests for extensions totaling less than six (6) months may be approved by the Executive Director and are not required to have Board approval. For extensions that require Board approval, the extension request must be received by the Department at least fifteen (15) business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items. If an extension is required at Cost Certification, the fee as identified in §49.14 of this chapter (relating to Program Related Fees) must be received by the Department to qualify for issuance of Forms 8609.

(d) Housing Tax Credit and Ownership Transfers. (§2306.6713) A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person including an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers (other than an Affiliate included in the ownership structure) will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the credit amount further described in §49.5(b) of this chapter (relating to Site and Development Restrictions), the credit amount will not be applied in the following circumstances:

(A) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) In cases where the General Partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(e) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two (2) years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code, and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) During the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the Federal Home Investment Partnership Program (HOME);

(B) During the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) During the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §49.9(a) of this chapter (relating to Selection Criteria), a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7) of the Code, and the Department declines to purchase the Development.

(f) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(g) Alternative Dispute Resolution (ADR) Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2010, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Ex-

cept as prohibited by law and the Department's Ex Parte Communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title (relating to Alternative Dispute Resolution and Negotiated Rulemaking).

(h) Compliance Monitoring and Material Noncompliance. Section 42(m)(1)(B)(iii) of the Code, requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of §42 of the Code and in notifying the IRS of any noncompliance of which the Department becomes aware. Detailed compliance rules and procedures for monitoring are set forth in Chapter 60 of this title (relating to Compliance Administration).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007035
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 94. PROPERTY TAX PROFESSIONALS

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 Texas Administrative Code (TAC), Chapter 94, §§94.10, 94.21, 94.22, and 94.70; the repeal of §94.25; and new §94.25, regarding continuing education requirements and the classification system for registrants in the property tax professionals program. The amendments to §§94.10, 94.21, 94.22, and 94.70; and new §94.25 are adopted with changes to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6884) and will be republished. The repeal of §94.25 is adopted without changes to the proposal and will not be republished.

These adopted rules are filed simultaneously with the adoption of the repeal of 22 TAC Chapter 623, §§623.6 - 623.10 in order to reorganize and clarify the rules regulating property tax professionals under 16 TAC relating to the rules of the Texas Department of Licensing and Regulation. The repeal of §94.25 and the adoption of all the amended and new rule provisions take effect January 1, 2011.

The most remarkable difference between the previous classification rules and the new standards are that the new standards require more training and education of registrants earlier in their career. Designated courses must be completed at the one-year mark. This increases public protection by ensuring that registrants performing public functions are earlier trained in skills necessary to successfully accomplish potential assignments. The substance of these rule changes was recommended by the Tax Professional Advisory Committee at its meeting on September 15, 2010.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed amendments were published in the August 13, 2010, issue of the *Texas Register.* The 30-day public comment period closed on September 13, 2010. The Department received public comments from sixteen interested parties: Marc Moffitt, Senior Appraiser, Denton CAD; Janet Jennings; Pat Praesel, RTA, Tax Assessor-Collector, Alief ISD; Cathy C. Talcott, Tax Assessor-Collector, Comal County; Thomas Spencer, Chief Deputy, Tarrant County Tax Office; Rhonda Hall, Morris County Appraisal District; Victoria Brown-Sobecki, RTA, Harris County; Deborah Hunt, Tax Assessor-Collector, Williamson County Texas; Michele Gregg, Director of Legislative and Political Affairs, Texas Apartment Association; Sands Stiefer, President Elect of Texas Association of Appraisal Districts ("TAAD"); Gary Barber, President of The Tax Assessor-Collectors Association of Texas; Michael Barnett, Chief Appraiser, Smith County Appraisal District; Jo Ann Masturzo, Chief Deputy for Bee County Tax Assessor-Collector's Office; Jerri Cox, Tax Assessor-Collector Aransas County; Carlton Pape, Chief Appraiser Caldwell County Appraisal District; and Paul Graser, Deputy Tax Assessor, McLennan County Tax Office The specific comments and the Department's responses are summarized below.

Public Comment: Marc Moffitt, Senior Appraiser, Denton CAD comments that the rule changes don't really change the standards. The Department needs to create higher standards for new registrants by requiring counties over 25,000 residents have minimum education standards of 60 hours college credit, three years licensed fee appraiser experience, five years real estate licensee experience.

Department Response: These are interesting ideas but the establishment of standards for education/qualification before entering the industry is the domain of the legislature to determine. The legislature has provided that no qualifications are necessary to join the industry. The Department does not have the power in our rule making efforts to redefine that entry standard into the industry.

Public Comment: Deborah Hunt, Tax Assessor-Collector, Williamson County Texas comments for the Department to include mandatory customer service course in core education. Also, she supports two elective courses for RTA's limited to mass appraisal, appraisal of agriculture and open space land, and oil and gas appraisals, appraisal of timberland or wildlife management appraisal.

Department Response: The Department vetted these standards at the initial rule making, the education summit, and over the course of work group meetings and advisory board meetings. With input of the public and the recommendation of the Advisory Board, it has been determined these standards are appropriate

to train each classification for their job and do not feel that any further change is necessary at this time.

Public Comment: Janet Jennings comments that she has worked 13 years in tax offices and has completed all courses and exams but was never registered. She is now on the track to getting certified in 2012. She advocates that if a person has worked 3 out of 5 years before they have officially registered and completed all other requirements, they should be allowed entry into the industry as a certified registrant.

Department Response: The statute demonstrates under Texas Occupations Code, §1151.106 requirements based on experience in property tax administration, education and training, professional performance and achievements, and compliance with the code of ethics. The statute requires that experience and compliance with the code of ethics be obtained while registered.

Public Comment: Pat Praesel, RTA, Tax Assessor-Collector, Alief ISD supports the changes and suggests rewording to clarify when registrations expire and when continuing education is due.

Department Response: Ms. Praesel has commented on similar concerns as TAAD and Michael Barnett. As a result of the repeat comment, and on the recommendation of the Advisory Board, the Department has amended §94.22 and §94.25 to clarify both issues.

Public Comment: Cathy C. Talcott, Tax Assessor-Collector, Comal County, comments that it is a waste of time and taxpayer money to take a Class III exam. She also supports deleting electives and saving them for continuing education.

Department Response: The electives were deleted and after much consideration, the Advisory Board felt the Level III exam for appraisers was valuable and choose to follow the practice of the former board and continue with the Class III appraiser exam. The Commission agrees with the recommendation of the Advisory Board.

Public Comment: Thomas Spencer, Chief Deputy, Tarrant County Tax Office does not support the proposed changes. He cannot find value added in the changes and it will be difficult to find local classes and pay for them in rural areas.

Department Response: Ultimately, the fundamental educational course work has not changed, it has simply been put on a different schedule. Overall there are no new costs affiliated with the course work over the certification education or continuing education of a registrant. With the deletion of Ad Valorum Tax Office Administration and distillation of hours by the comptroller, there may be some savings. Furthermore, the advent of more education opportunities through new education providers and webinars should alleviate any concerns for strain on local office costs. At this time continuing education is offered on-line and has been taken by registrants. As revealed at the education summit, travel expense is the greatest expense to taking continuing education (CE). With more providers and on-line options growing, travel expense is saved.

Public Comment: Rhonda Hall, Morris County Appraisal District comments that she is against the changes for it will be more costly to move from a five year continuing education cycle to a two year cycle.

Department Response: The advent of more education opportunities through new education providers and webinars should alleviate any concerns for strain on local office costs. At this time continuing education is offered on-line and has been taken by registrants. As revealed at the education summit, travel expense is the greatest expense to taking CE. With more providers and on-line options growing, travel expense is saved.

Public Comment: Victoria Brown-Sobecki, RTA, Harris County comments that is not clear what courses are repealed and replaced in §94.25. It has historically taken Harris County. employees over five years to successfully complete all classification requisites. It is difficult for Harris County to timely plan or pay fundamental education for its employees. She questions what the cost will be to accommodate the new standards. "Does the total reduced hours and cost include the customer service subject matter component? Or a separate expenditure?"

Department Response: Ultimately, the fundamental educational course work has not changed, it has simply been put on a different schedule. Overall there are no new costs affiliated with the course work over the certification education or continuing education of a registrant. With the deletion of Ad Valorum Tax Office Administration and distillation of hours by the comptroller, there may be some savings. Furthermore, the advent of more education opportunities through new education providers and webinars should alleviate any concerns for strain on local office costs. At this time continuing education is offered on-line and has been taken by registrants. As revealed at the education summit, travel expense is the greatest expense to taking CE. With more providers and on-line options growing, travel expense is saved. The customer service education is an optional subject matter that registrants may choose to take, however, it is not mandatory. Section 94.25, as in all our educational standards, does not adopt or repeal specific courses but rather selects subject matter areas for education. These are delineated in §94.25.

Public Comment: Sands Stiefer, President Elect of TAAD makes several points in his comment. First he advocates substantive educational standard changes including lessening the hours for a Class II appraiser and increasing a Class III appraiser's hours. TAAD also wishes the inclusion of a Class III appraiser examination. They further advocate for a transitional plan or original registrant classification and continuing education. The transition plan should address the need for new registrant's time cycle to take continuing education. Lastly, the penalty and cure for a registrant's failure to complete a requirement should be defined in rule.

Department Response: First, The Department vetted these standards at the initial rule making, at the education summit, over the course of work group meetings and Advisory Board meetings. With input of the public and the recommendation of the Advisory Board, it has been determined these standards are appropriate to train each classification for their job. On further contemplation of the Advisory Board, the Class III examination was added to reflect the previous practice of the previous board.

Second, it is agreed that the Department will have a transition plan for this one time transition to the new standards. We feel that it is appropriate to address that in policy set by the Department's Education and Examination Section, for this is a one-time transition. The Department doesn't want to create rules that have no purpose once the transition is over. The rule has been changed to include: "the Department may extend the expiration date of a registration to correspond to the registrant's original registration date."

The transition plan will include extending out these registrations until the year 2012. To further facilitate the transition policy as

determined by the Education and Examination Section, the Department will provide industry and individual support via FAQ's, customer service hotline, and listserv notices.

On the last point, this is not within the scope of the published rules. It is not appropriate for the Department to address any item that is outside the scope of the published rules.

Public Comment: Michele Gregg, Director of Legislative and Political Affairs, Texas Apartment Association comments that they are in support of the changes. However, they further advocate including Level II and Level III examinations for appraisers. Additionally, they feel rules should be put into place to require that only Class IV Appraisers serve as Chief Appraisers and that no registrant should be allowed to perform a job until they have shown proficiency in that area of work as demonstrated in the successful completion of course work in that area.

Department Response: The Department in response to this and TAAD's similar comment, and with the recommendation of its Advisory Board, added a Class III examination for appraisers. As for the second comment, the Department takes the position that it would exceed statutory authority to dictate in rule what job function each registrant may specifically perform.

Public Comment: Carlton Pape, Chief Appraiser Caldwell County Appraisal District supports the changes to the rules.

Public Comment: Jerri Cox, Tax Assessor-Collector Aransas County comments that it is difficult to differentiate between a new registrant and a certified registrant.

Department Response: The legislature differentiated certified registrants from new registrants by use of titles, classification, education, and continuing education standards. The legislature has acknowledged and addressed at length the differences between certified versus non-certified registrants. The Department cannot move beyond what the legislature has considered and deemed appropriate.

Public Comment: Jo Ann Masturzo, Chief Deputy for Bee County Tax Assessor-Collector's Office comments that she is an RTA and as a certified registrant she feels the new rules will be lessening the qualifications for new applicants and questions whether new registrants are learning as much as she had to in order to be certified.

Department Response: The standards for education are essentially the same as under the old board, simply the schedule registrants must take has been shifted to having courses completed earlier in a registrant's career.

Public Comment: Michael Barnett, Chief Appraiser, Smith County Appraisal District comments that newly certified registrants do not have a grace period in which to look back to completed continuing education for credit.

Department Response: As a result of this comment, TAAD's, and Pat Praesel similar comment, the Department on the recommendation of the Advisory Board amended §94.25(e) to demonstrate that newly certified registrants do not have to complete continuing education requirements until their second registration. This allows newly certified registrants over a year to complete their requisite education. The purpose of continuing education is to make sure registrants are up to date on recent course developments. Newly certified registrants have demonstrated that they have successfully mastered the most recent material by virtue of their successful certification. As such, a delayed grace period to complete continuing education is appropriate.

Public Comment: Gary Barber, President of The Tax Assessor-Collectors Association of Texas questions if there would be a grace period of 90 days to fulfill requirements should there be a natural disaster or health issue affecting a registrant. He further suggests a grace period on all standards for two years. Lastly he recommends that there be a roll-over accrual of all continuing education taken beyond 24 months of renewal.

Department Response: Any grace period or rollover provisions are not part of the published rules. It is not appropriate for the Department to address any item that is outside the scope of the published rules.

Public Comment: Paul Graser, Deputy Tax Assessor McLennan County Tax Office comments that once you get your license you should not lose it because you went from one field to another.

Department Response: This is not within the scope of the published rules. It is not appropriate for the Department to address any item that is outside the scope of the published rules.

16 TAC §§94.10, 94.21, 94.22, 94.25, 94.70

The amendments and new rule are adopted under Texas Occupations Code, Chapter 51 and Chapter 1151, which authorize the Commission the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and 1151. No other statutes, articles, or codes are affected by the adoption.

§94.10. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Act--Texas Occupations Code, Chapter 1151.

(2) Registered Texas Collector ("RTC")--Certified Class III Collector.

(3) Registered Professional Appraiser ("RPA")--Certified Class IV Appraiser.

(4) Registered Texas Assessor/Collector ("RTA")--Certified Class IV Assessor/Collector.

(5) USPAP--*Uniform Standards of Professional Appraisal Practice.*

§94.21. Registration.

To be registered an applicant must:

(1) be at least 18 years of age;

(2) be a resident of the State of Texas;

(3) be a person of good moral character;

(4) be a graduate of an accredited high school or holder of high school graduation equivalency;

(5) be actively engaged in appraisal, assessing/collecting, or collecting for an appraisal district, tax office, or private firm working for an appraisal district or tax office;

(6) submit a completed application on a form approved by the department;

(7) pay the applicable fees under §94.80; and

(8) successfully complete all requisites appropriate for the applicant's classification level:

(A) Appraisers

(i) A Class I appraiser must be registered.

(ii) A Class II appraiser must:

(I) be a Class I appraiser registrant; and

(II) successfully complete within twelve months of registration:

(-a-) no less than 32 hours in the basics of the Texas property tax system;

(-b-) no less than 8 hours in professional ethics.

(iii) A Class III appraiser must:

(I) be registered as a Class II appraiser registrant; and

(II) successfully complete within thirty-six months of registration:

(-a-) no less than 18 hours in the income approach to value;

(-b-) no less than 18 hours in the theory and practice of personal property appraisal;

(-c-) no less than 15 hours in USPAP;

(-d-) no less than 24 hours in the theory and practice of appraisal of real property; and

(-e-) pass the Class III examination.

(iv) A Class IV appraiser (RPA) must:

(I) be registered as a Class III appraiser registrant; and

(II) successfully complete within sixty months of registration:

(-a-) no less than 18 hours in analyzing real property appraisal;

(-b-) no less than 16 hours in Texas Property Tax Law; and

(-c-) no less than 18 hours in mass appraisal;

(III) successfully complete no less than seven hours in USPAP if the 15 hour USPAP course has not been completed in the last two years;

(IV) pass the appraiser Class IV examination within five years of registration; and

(V) have a minimum of three years experience as a registered appraiser.

(B) Assessor/Collectors

(i) A Class I assessor/collector must be registered.

(ii) A Class II assessor/collector must:

(I) be registered as a Class I assessor/collector registrant; and

(II) successfully complete within twelve months of registration:

(-a-) no less than 32 hours in the basics of the Texas property tax system; and

(-b-) no less than 8 hours in professional ethics.

(iii) A Class III assessor/collector must:

(I) be registered as a Class II assessor/collector registrant; and

(II) successfully complete within thirty-six months of registration:

(-a-) no less than 16 hours in Texas Property Tax Law; and

(-b-) no less than 18 hours in assessment and collection.

(iv) A Class IV assessor/collector (RTA) must:

(I) be registered as a Class III assessor/collector registrant;

(II) successfully complete within sixty months of registration:

(-a-) no less than 18 hours in advanced assessment and collections;

(-b-) no less than 12 hours in truth in taxation;

(III) pass the Class IV assessor/collector examination within five years of registration; and

(IV) have a minimum of three years experience as a registered assessor/collector.

(C) Collectors

(i) A Class I collector must:

(I) be registered; and

(II) successfully complete within twelve months of registration:

(-a-) no less than 32 hours in the basics of the Texas property tax system; and

(-b-) no less than 8 hours in professional ethics.

(ii) A Class II collector must:

(I) be registered as a Class I registrant; and

(II) successfully complete:

(-a-) no less than 16 hours in Texas Property Tax Law;

(-b-) no less than 18 hours in assessment and collection; and

(-c-) no less than 18 hours in advanced assessment and collections.

(iii) A Class III collector (RTC) must:

(I) be registered as a Class II collector registrant;

(II) pass the collector Class III examination within three years of registration; and

(III) have a minimum of two years experience as a registered collector.

(D) The provisions in this paragraph apply to registrations that renew on or after January 1, 2011.

§94.22. Renewal of Registration.

(a) All registrations expire one year after the day issued. The Department may extend the expiration date of a registration to correspond to the registrant's original registration date.

(b) To renew an applicant must:

(1) comply with all provisions of the Act and this chapter;

(2) submit a completed application on a department-approved form;

(3) pay the applicable fees; and

(4) successfully complete all requisites appropriate for the renewal applicant's classification level.

(c) To renew and maintain continuous registration, the renewal requirements must be completed prior to the expiration of the registration.

(d) Applications not filed by the expiration date are considered applications for late renewal and are subject to late renewal fees under §60.83 of this title (relating to Late Renewal Fees).

(e) Registrations issued from a late renewal application will have an unregistered period from the expiration date of the previous registration to the issuance date of the renewed registration. Work that requires a registration issued under this chapter must not be performed during the unregistered period.

(f) A registrant must complete all registration renewal requirements within one year of the date the registration expires, or the renewal application shall be deemed void.

(g) If the registrant does not meet the deadline established in subsection (f), the person must reapply for a new registration by complying with the requirements and procedures, including any examination requirements and payment of fees.

(h) Non-receipt of a renewal notice from the department does not exempt a person from any requirement of this chapter.

§94.25. Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) A Registered Professional Appraiser (RPA) must complete 30 hours of approved continuing education to be eligible to renew the registration. The continuing education must include:

(1) two hours in professional ethics;

(2) a state laws and rules update course; and

(3) seven hours in USPAP.

(c) A Registered Texas Assessor-Collector (RTA) must complete 30 hours of approved continuing education to be eligible to renew the registration. The continuing education must include:

(1) two hours in professional ethics; and

(2) a state laws and rules update course.

(d) A Registered Texas Collector (RTC) must complete 10 hours of approved continuing education to be eligible to renew the registration. The continuing education must include:

(1) two hours in professional ethics; and

(2) a state laws and rules update course.

(e) Continuing education credit must be completed during the 24 month period before the expiration of the license. Newly certified registrants are not required to complete continuing education until their second renewal after completing their certification.

(f) For a late renewal, the continuing education hours must have been completed within the two-year period prior to the date of renewal.

(g) A course approved for use under §94.21 may be taken for continuing education credit.

(h) A registrant may not receive continuing education credit for attending the same department-numbered course more than once within the two-year period prior to the date of renewal.

(i) A RTC, RPA, or RTA must retain a copy of the certificate of completion for a course for two years after the date of completion. In conducting any inspection or investigation of the registrant, the department may examine the registrant's records to determine compliance with this subsection.

(j) To be approved by the Comptroller, a provider's course must be dedicated to instruction in:

(1) appraisal procedures and methods;

(2) tax assessment and collection;

(3) professional ethics;

(4) laws and rules;

(5) USPAP; or

(6) customer service.

(k) The provisions in this section apply to registrations that renew on or after January 1, 2011.

§94.70. Responsibilities of a Registrant: General.

(a) A registrant must not violate any provision of the Act or this chapter.

(b) A registrant must timely respond to the department's investigative requests including making a complete written answer to any complaint.

(c) Registrants must inform the department within 30 days of any changes to their employment and change their registration as appropriate.

(d) A registrant must not violate the property tax professional's Code of Ethics, referenced in §94.100, or aid or encourage another to violate the Code of Ethics.

(e) A registrant must not engage in any practices that constitute acts of improper influence, conflict of interest, unfair treatment, discrimination, abuse of powers, or misuse of titles.

(f) A registrant must be in compliance with any report issued by the Comptroller of Public Accounts under §5.102 of the Tax Code.

(g) An appraisal registrant or assessor/collector must be certified in their field within five years of registration.

(h) A collector registrant must be certified in their field within three years of registration.

(i) A registrant may act in a purely private capacity regarding a personal tax matter so long as he does not use his official position to influence the outcome of such a dispute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007012
Brian E. Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2011
Proposal publication date: August 13, 2010
For further information, please call: (512) 463-7348

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16 TAC §94.25

The repeal is adopted under Texas Occupations Code, Chapter 51 and Chapter 1151, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and 1151. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007013
Brian E. Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2011
Proposal publication date: August 13, 2010
For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 75. CURRICULUM
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING DRIVER EDUCATION STANDARDS OF OPERATION FOR PUBLIC SCHOOLS, EDUCATION SERVICE CENTERS, AND COLLEGES OR UNIVERSITIES

19 TAC §§75.1001 - 75.1003, 75.1005, 75.1006

The Texas Education Agency (TEA) adopts amendments to §§75.1001-75.1003, 75.1005, and 75.1006, concerning driver education. The amendments are adopted without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8643). The sections address driver education standards of operation for public schools, education service centers, and colleges or universities. The adopted amendments reflect changes resulting from the 81st Texas Legislature, 2009, and incorporate changes to reflect driver education industry standards.

House Bill (HB) 339 and HB 2730, 81st Texas Legislature, 2009, amended the Texas Education Code (TEC), §29.902, to require a school district to consider offering a driver education and traffic safety course during each school year. HB 2730 also permits the district to charge a fee for the course or contract with a licensed driver education school.

HB 339 and HB 2730, 81st Texas Legislature, 2009, amended the TEC, §1001.101, to require a certain number of hours of behind-the-wheel and observation instruction and increase the total hours of behind-the-wheel driving instruction a minor receives by adding 20 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night.

Senate Bill (SB) 1317, 81st Texas Legislature, 2009, amended the TEC, §1001.101, to require the commissioner by rule to establish the curriculum and designate the educational materials to be used in a driver education course for minors and adults.

SB 1967, 81st Texas Legislature, 2009, added the TEC, §1001.1025, to require motorcycle awareness to be included in the curriculum of any driver education course or driving safety course.

SB 1107 and HB 339, 81st Texas Legislature, 2009, added the TEC, §1001.110, to state that the commissioner by rule shall require information relating to driving distractions to be included in the curriculum of any driver education course or driving safety course.

HB 339 and HB 2730, 81st Texas Legislature, 2009, added the TEC, §1001.257, to allow the commissioner to deny an instructor license if a person has accumulated six or more penalty points on his or her driving record during the preceding 36-month period.

The adopted amendments to 19 TAC Chapter 75, Subchapter AA, update the rules to reflect statutory changes. In addition, informal stakeholder discussions were held from July 2009-May 2010 with school districts and industry members. A draft of the proposed amendments was circulated to interested parties and comments solicited. Specifically, the following changes were made.

Sections 75.1001, Administration and Supervision, 75.1002, Driver Education Teachers, and 75.1003, Teaching Assistants, were amended to reduce the number of penalty points allowed on the personal driving records of driver education teachers, teaching assistants, teaching assistants (full or in-car only), and student instructors from 10 to 6 within the preceding 36 months. The sections were also amended to require schools to use standards for assessing penalty points as found in the Texas Transportation Code.

Section 75.1005, Course Requirements, was amended to require all public driver education programs to consist of a certain number of classroom hours; a certain number of in-car hours or simulator instruction taught in the presence of an instructor; and an additional 20 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of the Texas Transportation Code, §521.222(d)(2). Provisions were also added to limit driver education training verified by the parent to one hour per day and require course content to include driving distractions and motorcycle awareness. In addition, the section was amended to require that each student be provided with a textbook or driver education instructional materials approved by the TEA.

Section 75.1006, Driver Licensing, was updated to specify that behind-the-wheel instruction and in-car observation must be in the presence of a certified instructor. In addition, the section was amended to include an additional 20 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of the Texas Transportation Code, §521.222(d)(2).

Technical edits were also made throughout the subchapter.

The adopted amendments add no reporting requirements. The adopted amendments have no new locally maintained paperwork requirements.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began September 24, 2010, and ended October 25, 2010. Following is a summary of public comments received and the corresponding agency responses regarding proposed amendments to 19 TAC Chapter 75, Subchapter AA.

Comment. The director of business development for CyberActive, Inc. requested clarification on whether alternative delivery method (ADM) providers of driver education and defensive driving qualify as licensed driver education schools for the purpose of contracting with school districts or if school districts are only permitted to license with driver education and defensive driving schools with physical locations.

Agency Response. The agency provides the following clarification. A school district can only contract with a licensed driver education school that has a TEA-approved facility. An ADM driving safety course provider and a driving safety school (defensive driving school) cannot offer driver education or contract with a public school to offer driver education unless they have met all licensing requirements and have obtained a driver education school license through TEA.

Comment. A community education coordinator / driver education programmer commented that the rules should define night driving as sunset to sunrise. The commenter also stated that classroom teacher requirements for driver education programs in public schools should be the same as those for commercial schools.

Agency Response. The agency disagrees. The definition for night driving is already defined in the Texas Transportation Code and is included in the Texas Driver's Handbook, which is material required for a minor and adult driver education course. In addition, the TEC requires a public school classroom teacher to hold a Texas teaching certificate.

Comment. A public school driver education teacher recommended more flexibility with driving times for rural students.

Agency Response. The agency disagrees. The current one-hour time frame for a behind-the-wheel lesson has already been extended from the national recommendation of 30 minutes. Increasing the time an individual student drives behind the wheel will not resolve the issue for rural schools. A solution would be for the rural schools to increase to a three-hour behind-the-wheel session with three or four students. This would not require an increase in each student's behind-the-wheel driving time.

The amendments are adopted under the TEC, §7.021(b)(9) and §29.902, which authorize the agency to develop a program of instruction in driver education and traffic safety for public school students; §51.308, which states that a driver education course for the purpose of preparing students to obtain a driver's license may be offered by an institution of higher education, as defined by the TEC, §61.002, with the approval of the TEA; §1001.101, as amended by HB 339 and HB 2730, 81st Texas Legislature, 2009, which requires the commissioner by rule to establish or approve the curriculum and designate the textbooks to be used in a driver education course for minors and adults, including a driver education course conducted by a school district, driver education school, or parent or other individual under Texas Transportation Code, §521.205. Section 1001.101 requires that the driver education course include 7 hours of behind-the-wheel instruction and 7 hours of observation instruction in the presence of a person who holds a driver education instructor license or who meets the requirements of the Texas Transportation Code, §521.205, and an additional 20 hours of behind-the-wheel instruction, including at least 10 hours that takes place at night, in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2); §1001.101, as amended by SB 1317, 81st Texas Legislature, 2009, which requires the commissioner by rule to establish the curriculum and designate the educational materials to be used in a driver education course for minors and adults and a driver education course exclusively for adults. Section 1001.101 specifies certain requirements for the driver education course exclusively for adults; §1001.1025, which requires the agency by rule to require that information relating to motorcycle awareness, the dangers of failing to yield the right-of-way to a motorcyclist, and the need to share the road with motorcyclists be included in the curriculum of any driver education course or driving safety course; §1001.110, which requires the commissioner by rule to require that information relating to the effect of using a wireless communication device or engaging in other actions that may distract a driver on the safe or effective operation of a motor vehicle be included in the curriculum of each driver education course or driving safety course; and §1001.257, which states that the commissioner may not issue or renew a driver education instructor license, including a temporary license, to a person who has six or more points assigned to the person's driver's license under Texas Transportation Code, Chapter 708, Subchapter B.

The adopted amendments implement the TEC, §§7.021(b)(9); 29.902; 51.308; 1001.101, as amended by HB 339 and HB 2730, 81st Texas Legislature, 2009; 1001.101, as amended by SB 1317, 81st Texas Legislature, 2009; 1001.1025; 1001.110; and 1001.257.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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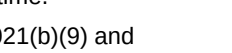

CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1025

The Texas Education Agency (TEA) adopts an amendment to §129.1025, concerning student attendance accounting. The section is adopted with changes to the proposed text as pub-

lished in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9027). The section adopts by reference the annual student attendance accounting handbook. The handbook provides student attendance accounting rules for school districts and charter schools. The adopted amendment adopts by reference the student attendance accounting handbook for the 2010-2011 school year.

Legal counsel with the TEA has recommended that the procedures contained in each annual student attendance accounting handbook be adopted as part of the Texas Administrative Code. This decision was made in 2000 as a result of a court decision challenging state agency decision making via administrative letters and publications. Given the statewide application of the attendance accounting rules and the existence of sufficient statutory authority for the commissioner of education to adopt by reference the student attendance accounting handbook, staff proceeded with formal adoption of rules in this area. The intention is to annually update the rule to refer to the most recently published student attendance accounting handbook. Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

Each annual student attendance accounting handbook provides school districts and charter schools with the Foundation School Program (FSP) eligibility requirements of all students, prescribes the minimum requirements of all student attendance accounting systems, lists the documentation requirements for attendance audit purposes, specifies the minimum standards for systems that are entirely functional without the use of paper, and details the responsibilities of all district personnel involved in student attendance accounting. The TEA distributes FSP resources under the procedures specified in each current student attendance accounting handbook. The final version of the student attendance accounting handbook is published on the TEA website each July or August. A supplement, if necessary, is also published on the TEA website.

The adopted amendment to 19 TAC §129.1025 adopts by reference the student attendance accounting handbook for the 2010-2011 school year. The release of a second version of the handbook, *2010-2011 Student Attendance Accounting Handbook Version 2,* was necessary to incorporate changes made in response to public comment. Section 129.1025 was modified at adoption to reference the correct version of the student attendance accounting handbook.

Significant changes to the *2010-2011 Student Attendance Accounting Handbook Version 2* from the *2009-2010 Student Attendance Accounting Handbook Version 2* include the following.

Throughout the Handbook

In sections 3, 4, 6, 7, 8, and 10, references to students transferring have been replaced with references to students moving where appropriate, to preserve use of the word *transfer* only for circumstances in which a student is legally transferred into a district as described in subsection 3.2.1.4.

In sections 3, 5, and 10, requirements from which charter schools are exempt have been explicitly identified.

Section 1

An explanation that web addresses are subject to change and of how to find the most current TEA web addresses has been added.

Section 2

Clarification that documentation other than documentation related to student attendance may need to be kept longer than five years has been added.

An explanation that, for certain alternative attendance programs, eligible minutes of attendance instead of eligible days of attendance should be reported has been added.

Section 3

Specific references to aliens, foreign exchange students, and students who attend a regional day school program for the deaf have been deleted from the subsection on average daily attendance (ADA) eligibility codes.

Information on special minimum eligible age requirements applicable to children of military families has been added.

Clarifications that special education students who are returning to school under 19 TAC §89.1070, Graduation Requirements, are eligible for funding have been added.

In subsection 3.2.3.2, a sentence identifying types of students who are eligible to graduate but who may continue their education and be eligible for funding has been corrected to indicate that two exceptions, and not just one, are being described.

Information on student absences for the purpose of auditing classes at a charter school has been added.

A subsection on a limited exception to the requirement that a district serve a student residing in the district has been added.

Information on which district employees are eligible to take attendance and an explanation that using a "sign-in" sheet to record attendance is not acceptable have been added.

A subsection on the attendance-taking protocol to be used when the start of the school day is delayed has been added.

A subsection on the permissibility of having alternate attendance-taking times for certain students has also been added.

A clarification of which absences are considered absences for required court appearances has been added, as has a clarification that temporary absences for health care appointments must be for face-to-face appointments to be excused for funding purposes.

A subsection on excused absences for academic purposes has been added.

An explanation that a student who is exempt from taking exams and attends school on exam day only to "sign in" has not met minimum instructional time requirements for funding purposes has been added.

Multiple changes have been made in the subsection on the General Education Homebound (GEH) program. An explanation that, over the period of confinement, a student must be provided instruction in all his or her courses has been added. A clarification that a student entering the program retains the same ADA eligibility code as before entering the program has been added. The GEH funding chart has been expanded to clarify how eligible days present are earned, and information on calculating eligible days present has been added. A subsection on test administration and the GEH program has been added. Clarification on transitioning out of (and back into) the program and the calculation of attendance has been added.

All information on waivers has been placed under the same subsection. Clarification about when a missed instructional day

waiver may be applied for has been added, as has information on early-release days. Information on documenting waiver approval and on attendance accounting for missed instructional days or low-attendance days has been added.

Dates for submission and resubmission of attendance data by districts operating year-round programs have been updated.

In response to public comment, subsections 3.2.1.1 and 3.2.2.2 were modified at adoption to reflect a recent agency policy change allowing students who have met course requirements for graduation but have not passed the required state assessment and are attending school to participate in a review program to retake the assessment to be eligible to generate state funding for this attendance.

Also in response to public comment, subsection 3.2.1.4 was modified at adoption to align handbook information with the information in the September 30, 2010, TEA "To the Administrator Addressed" letter with the subject line "Order in Civil Action 5281." This letter explains that, because of a recent court order, it is no longer necessary for all Texas school districts to report transfers of students. The compliance statement at the end of the handbook was also modified at adoption to reflect the change in policy.

Section 4

Special education eligibility requirements have been clarified.

In applicable subsections throughout the section, explanations have been added that, for the mainstream instructional setting/arrangement code to be used for a three- or four-year-old student, the majority of the student's class must be made up of students who are not receiving special education services.

Minor clarifications and a correction have been made in the Public Education Information Management System (PEIMS) coding charts that appear in subsection 4.2.10. Information applicable to prekindergarten students who do not have disabilities has been removed and added to a chart in section 7.

A subsection on transfer of records and special education students has been added.

A statement that a student's admission, review, and dismissal (ARD) committee must review the student's individualized education program at least annually has been added.

Clarification about when to use the code for no instructional arrangement/setting has been added.

Multiple changes have been made in the subsection on the homebound instructional arrangement/setting. Eligibility criteria have been clarified. An explanation that a student's ARD committee determines the amount of services to be provided to the student over the period of confinement has been added. A clarification that a student being served in this setting retains the same ADA eligibility code as before being served in this setting has been added. The homebound funding chart has been expanded to clarify how eligible days present are earned, and information on calculating eligible days present has been added. Clarification on transitioning out of (and back into) this setting and the calculation of attendance has been added.

The term *state school* has been replaced with *state supported living center.*

In subsection 4.6.6, the first column of the table, which provides information on the coding to use for students in certain residential facilities, has been revised for clarity.

Clarification about when to use code 42, one of the codes for the resource room/services instructional arrangement/setting, for a 3- or 4-year-old student has been added, as has clarification about the speech therapy indicator code to use for students in this setting who are pulled out of the general education classroom for speech therapy and other services.

Clarification that the code for the vocational adjustment class instructional arrangement/setting applies only to a student in paid employment has been added.

Language describing requirements related to the mainstream instructional arrangement/setting code has been made consistent in all subsections in which the requirements appear.

Statements that students served at the Texas School for the Blind and Visually Impaired and the Texas School for the Deaf should be reported with ADA eligibility codes of 0 have been removed.

At adoption, a technical edit was made to correct the number of minutes of general education instruction specified in Example 3 of subsection 4.14.4.

Section 5

Requirements related to teacher qualifications and to required documentation have been modified.

A statement that students below Grade 9 are not eligible for career and technical education (CTE) contact hours even if they take a high school course has been removed.

Requirements related to course funding eligibility, specifically to course program intent codes and to PEIMS reporting, have been modified.

Information on career preparation courses has been revised to specify that these courses are for only paid experience, and information on CTE practicum courses has been added. Information on requirements for both of these types of courses has been added, along with an explanation of the differences between them.

Requirements related to paid CTE learning experiences have been modified.

The term *independent study course* has been replaced with *Problems and Solutions course.*

Section 6

Enrollment procedures have been modified to specify that personnel testing students for English proficiency must be trained.

The bilingual/English as a Second Language (ESL) program exit criteria and procedures have been updated to reflect 2010-2011 school year testing information and to reference current documents.

Certification requirements for teachers of certain bilingual/ESL high school courses have been modified.

Writing samples have been added to the list of documentation that must be kept in a student's permanent record.

At adoption, a technical edit was made to update the web links in footnotes 123 and 125 to link to current-year documents.

Section 7

Information on documentation requirements related to prekindergarten eligibility based on a parent's membership in the armed forces has been revised.

Information on letters verifying prekindergarten eligibility that are provided by the Department of Family and Protective Services and Child Protective Services has been updated.

The table in the subsection on prekindergarten eligible days present has been revised.

Additional information and requirements related to the prekindergarten Early Start Grant Program have been added.

Section 8

The subsection on documentation has been revised to state that the gifted/talented program should be included in the district improvement plan as well as in the campus improvement plan.

Section 9

Multiple changes have been made in the subsections on Pregnancy Related Services (PRS) Compensatory Education Homebound Instruction (CEHI) and on special education and PRS collaborative confinement. The charts on eligible days present earned have been expanded to clarify how the days are earned, and information on calculating eligible days present has been added to the collaborative confinement subsection. Clarifications that a student being served in confinement retains the same ADA eligibility code as before being served in confinement have been added. An explanation that, over the period of confinement, a student must be provided instruction in all her courses has been added to the CEHI subsection.

Section 10

Information on evaluation of disciplinary alternative education programs and juvenile justice alternative education programs (JJAEPs) and accountability has been modified and added.

Clarification of information and requirements related to residential alternative education programs has been added.

Information on reporting attendance of "truant" JJAEP students has been added.

Section 11

Texas Administrative Code information on dual credit course eligibility that was previously referenced in a footnote has been explicitly stated.

Information on reporting dual credit attendance in PEIMS has been modified.

A subsection on Gateway to College and similar programs has been added.

The subsection on the Optional Extended Year Program has been modified to explain that the program will not be funded for the 2010-2011 school year.

Information on an exception to certain Optional Flexible School Day Program requirements has been added.

The subsection on the Optional Flexible Year Program (OFYP) has been modified to add a statement that districts are encouraged to provide additional instructional days for eligible students throughout the school year instead of only at the end of the school year and a statement that an OFYP instructional day may not be scheduled on the same day as an early release day.

In the subsection on the Texas Virtual School Network, information referencing students in Grades 3-9 has been modified to reference students in Grades 3-10. Information on funding and fees has been clarified.

A subsection on the Interstate Compact on Educational Opportunity for Military Children has been added.

Section 12

An incorrect funding weight amount has been corrected.

Section 13

Glossary definitions have been updated, and obsolete definitions have been deleted.

The adopted amendment places the specific procedures contained in the *2010-2011 Student Attendance Accounting Handbook Version 2* in the Texas Administrative Code. The TEA distributes FSP funds according to the procedures specified in each annual student attendance accounting handbook. Data reporting requirements are addressed through the PEIMS.

The handbook has long stated that school districts and open-enrollment charter schools must keep all student attendance documentation for five years from the end of the school year. Any new student attendance documentation required to be kept corresponds with the student attendance accounting requirement changes described previously.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in the Texas Government Code, §2006.002, is required.

The public comment period on the proposal began October 8, 2010, and ended November 8, 2010. Following is a summary of the public comments received and the corresponding agency responses.

Comment: An employee of a charter school commented that the *2010-2011 Student Attendance Accounting Handbook* should be updated to reflect a recent policy change allowing students who have met course requirements for graduation but have not passed the required state assessment and are attending school to participate in a review program to retake the assessment to be eligible to generate state funding for this attendance.

Agency Response: The agency agrees. Subsections 3.2.1.1 and 3.2.2.2 were modified at adoption to reflect the recent policy change. To incorporate this and other changes, an updated version of the handbook, *2010-2011 Student Attendance Accounting Handbook Version 2,* has been released.

Comment: An employee of an education service center commented that the information in subsection 3.2.1.4 of the *2010-2011 Student Attendance Accounting Handbook* stating that school districts must report student transfers through the Student Transfer System contradicted information in the September 30, 2010, TEA "To the Administrator Addressed" letter with the subject line "Order in Civil Action 5281." This letter explains that, because of a recent court order, it is no longer necessary for all Texas school districts to report transfers of students.

Agency Response: The agency agrees. Subsection 3.2.1.4 and the compliance statement that appears at the end of the handbook have been updated to reflect the information in the September 30, 2010, "To the Administrator Addressed" letter. To incorporate this and other changes, an updated version of the handbook, *2010-2011 Student Attendance Accounting Handbook Version 2,* has been released.

The amendment is adopted under the Texas Education Code (TEC), §42.004, which authorizes the commissioner of educa-

tion, in accordance with rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the TEC, §42.004.

§129.1025. Adoption by Reference: Student Attendance Accounting Handbook.

(a) The standard procedures that school districts and charter schools must use to maintain records and make reports on student attendance and student participation in special programs for school year 2010-2011 are described in the official Texas Education Agency (TEA) publication *2010-2011 Student Attendance Accounting Handbook Version 2*, which is adopted by this reference as the agency's official rule. A copy of the *2010-2011 Student Attendance Accounting Handbook Version 2* is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. In addition, the publication can be accessed from the TEA official website. The commissioner of education will amend the *2010-2011 Student Attendance Accounting Handbook Version 2* and this subsection adopting it by reference, as needed.

(b) Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2010.

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CHAPTER 153. SCHOOL DISTRICT PERSONNEL

SUBCHAPTER CC. COMMISSIONER'S RULES ON CREDITABLE YEARS OF SERVICE

19 TAC §153.1022

The Texas Education Agency (TEA) adopts an amendment to §153.1022, concerning the minimum salary schedule for certain professional staff. The amendment is adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8848) and will not be republished.

The section establishes definitions of qualifying staff, details eligibility criteria for placement on the salary schedule, and explains the base pay. The adopted amendment updates the rule to modify the calculation of the minimum salary schedule prescribed by the Texas Education Code (TEC), §21.402, as amended by House Bill (HB) 3646, 81st Texas Legislature, Regular Session, 2009.

The commissioner is authorized to adopt a minimum monthly salary schedule for certain professionals, including classroom teachers, full-time librarians, full-time counselors, and full-time nurses. The salary schedule is based on the employee's level of experience. In accordance with the TEC, §21.402, enacted by Senate Bill 4, 76th Texas Legislature, 1999, 19 TAC §153.1022 was adopted to be effective January 2, 2000. The section establishes definitions of qualifying staff, details eligibility criteria for placement on the salary schedule, and explains the base pay. Salaries are adjusted using a factor, defined as "FS" in the TEC, §21.402(a), based on state assistance under the TEC, §42.302. The rule was last amended in 2006 to incorporate a new element in the determination of "FS" and to specify salary rates applicable for the 2006-2007 and 2007-2008 school years. The adopted amendment updates the rule to modify the calculation of the minimum salary schedule for the 2009-2010 and 2010-2011 school years prescribed by the TEC, §21.402, as amended by HB 3646, 81st Texas Legislature, Regular Session, 2009.

In June 2009, the 81st Texas Legislature, amended the TEC, §21.402, providing for increases in the minimum salary schedule for the 2009-2010 school year. The changes in statute increased the minimum salary schedule by the greater of $80 or a uniform monthly amount determined by multiplying $60 by the number of students in weighted average daily attendance (WADA), then dividing that product by the total number of months of employment of eligible employees during the 2009-2010 school year. For the purpose of determining the uniform monthly amount, the product of $60 multiplied by the WADA may be reduced by related social security coverage costs and by related payments made by the district under Government Code, §825.405. The adopted amendment to 19 TAC §153.1022 updates the rule in response to statutory changes, as follows.

Subsection (a) is revised to add a definition for full-time speech pathologists.

Subsection (b) is revised to delete school years 2005-2006 and 2006-2007 as base years and delete the $250 per month pay increase. The revision reflects the 2008-2009 adopted local salary schedule as the base year for the 2009-2010 and 2010-2011 school years, pursuant to Attorney General Opinion No. GA-0785. The revision also incorporates language relating to the salary increase mandated by HB 3646, 81st Texas Legislature, Regular Session, 2009. In addition, language is added in subsection (b) to include eligibility for full-time speech pathologists to receive the state-mandated pay raise during the 2009-2010 and 2010-2011 school years.

Subsection (c) is revised to correspond with changes in HB 3646, 81st Texas Legislature, Regular Session, 2009.

Subsection (d) is revised to change the reference from the 2006-2007 school year to the 2009-2010 and 2010-2011 school years. In addition, the table set forth as Figure: 19 TAC §153.1022(d) is updated to include the annual salary amounts for 10-month contracts. The state-adopted minimum salary schedule for the 2009-2010 and 2010-2011 school years does not reflect the uniform monthly amount determined by computing $80 or the $60/WADA calculation mandated under HB 3646 and, therefore, the actual salaries paid by districts across the state is not reflected.

The adopted amendment has no reporting implications. Regarding procedural implications, the TEA will retrieve any necessary information such as number of full-time classroom teachers, full-time librarians, full-time counselors, full-time nurses, and

full-time speech pathologists from data already collected through PEIMS. The adopted amendment has no new locally maintained paperwork requirements.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began October 1, 2010, and ended November 1, 2010. No public comments were received.

The amendment is adopted under the Texas Education Code, §21.402, which authorizes the commissioner of education to adopt rules to govern the application of the minimum salary schedule for certain professional staff.

The amendment implements the Texas Education Code, §21.402.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 176. DRIVER TRAINING SCHOOLS

The Texas Education Agency (TEA) adopts amendments to §§176.1001, 176.1003, 176.1004, 176.1006-176.1008, 176.1010, 176.1012, 176.1013, 176.1015, 176.1016, 176.1018, 176.1101, 176.1103-176.1110, 176.1113, 176.1114, and 176.1117; the repeal of §176.1019; and new §176.1019 and §176.1020, concerning driver training schools. The amendments to §§176.1001, 176.1003, 176.1004, 176.1006, 176.1010, 176.1012, 176.1013, 176.1015, 176.1016, 176.1018, 176.1101, 176.1103, 176.1104, 176.1106, 176.1107, 176.1109, 176.1113, and 176.1117; the repeal of §176.1019; and new §176.1019 and §176.1020 are adopted without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8650) and will not be republished. The amendments to §§176.1007, 176.1008, 176.1105, 176.1108, 176.1110, and 176.1114 are adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8650). The sections establish minimum standards for operation of licensed Texas driver education schools and driving safety schools and course providers. The adopted rule actions reflect changes resulting from the 81st Texas Legislature, 2009, and incorporate changes to reflect driver education industry standards.

House Bill (HB) 339 and HB 2730, 81st Texas Legislature, 2009, amended the Texas Education Code (TEC), §1001.101, to require a certain number of hours of behind-the-wheel and observation instruction and increase the total hours of behind-the-wheel driving instruction a minor receives by adding 20 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night.

Senate Bill (SB) 1317, 81st Texas Legislature, 2009, amended the TEC, §1001.101, to provide for a driver education course exclusively for adults, including requirements for certain instructional topics to be included in the course and allowance for the course to be offered online.

HB 339, 81st Texas Legislature, 2009, added the TEC, §1001.1015, to require the commissioner by rule to establish the curriculum and designate the educational materials to be used in a driver education course exclusively for adults. HB 339 also required certain instructional topics to be included in a driver education course exclusively for adults and allowed this course to be offered online.

SB 1967, 81st Texas Legislature, 2009, added the TEC, §1001.1025, to require motorcycle awareness to be included in the curriculum of any driver education course or driving safety course.

SB 1107 and HB 339, 81st Texas Legislature, 2009, added the TEC, §1001.110, to state that the commissioner by rule shall require information relating to driving distractions to be included in the curriculum of any driver education course or driving safety course.

HB 339 and HB 2730, 81st Texas Legislature, 2009, added the TEC, §1001.257, to allow the commissioner to deny an instructor license if a person has accumulated 6 or more penalty points on his or her driving record during the preceding 36-month period.

The adopted revisions to 19 TAC Chapter 176, Subchapters AA and BB, update the rules to reflect statutory changes and current driver education industry standards. In addition, informal stakeholder discussions were held from July 2009-May 2010 with school districts and industry members. A draft of the proposed revisions was circulated to interested parties and comments solicited. Specifically, the following changes were made.

Subchapter AA, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools

Section 176.1001, Definitions, was amended to add definitions for the terms "ADE-1317," "alternative method of instruction," "clock hour," "course content validation question," "personal validation question," and "teacher of record." In addition, definitions were clarified for the terms "break," "DE-964," and "good reputation."

Section 176.1003, Driver Education School Licensure, was amended to clarify the requirement relating to submitting the appropriate fee prior to changing school locations and the refund requirement for a student not willing to transfer to a new school location. An additional circumstance under which the TEA may declare a school to be closed was also added.

Section 176.1004, Driver Education School Responsibility for Employees, was amended to clarify that a student instructor-trainee may teach under the direction of an instructor who is not required to possess a supervising teacher endorsement. The requirement is less restrictive due to the decreased number of supervising teachers available in Texas. The section was also amended to add reference to ADE-1317 certificates, which are to be issued upon completion of a driver education course exclusively for adults.

Section 176.1006, Driver Education Instructor License, was amended to clarify language relating to instructor endorse-

ments for supervising driver education teacher, driver education teacher, and teaching assistant-full and add new language relating to an endorsement for supervising teaching assistant-full. The section was also amended to specify the circumstances for which a driver education instructor may or may not receive credit for continuing education requirements. In addition, the section was amended to allow the commissioner to suspend, revoke, or deny a license to any driver education instructor who accumulates 6 or more penalty points on their personal driving record within the preceding 36 months.

Section 176.1007, Courses of Instruction, was amended as follows.

A requirement was added in subsection (b) that all driver education course content must be current with regard to data, laws, procedures, and methodology.

In subsection (b)(1), the term "teenage driver education" was changed to "minor and adult driver education" to reflect changes to the TEC, §1001.101. A requirement was added for the additional 20 hours of behind-the-wheel instruction provided by the parent, including prohibiting simulation hours from counting toward the additional 20 hours and limiting the instruction to 1 hour per day. In response to public comment, a change was made at adoption to specify the age requirement for persons who may enroll in a minor and adult driver education course as age 14 and over.

Subsection (b)(1) was also amended to specify that all driver education course curricula must meet objectives outlined in the Program of Organized Instruction in Driver Education and Traffic Safety (POI), allow photographic slides to be used as instructional aides during driver education classroom instruction, and clarify that the allowable times for in-car instruction are specific to instruction provided by the school.

Subsection (b)(1) was further amended to require a licensed driver education instructor to be present during use of multimedia systems, simulators, and multicar driving ranges; provide for certain time periods of simulation training to substitute for behind-the-wheel training and in-car observation requirements; allow a student to apply for an instructional permit with the Department of Public Safety (DPS) after completing six hours of classroom instruction in Module One of the POI if he or she enrolls in a concurrent program; and indicate when an instructor can complete a DL-42 form and send it to DPS in order to cancel a student's instruction permit.

New subsection (b)(2) was added to provide detailed criteria for traditional and online driver education courses exclusively for adults. Driver education school owners will submit the course to the TEA for review and approval. The criteria for online courses is consistent with the criteria already used for approval of online driving safety courses. Outdated adult driver education course guidelines were deleted. In addition, requirements were added that a person age 18 to under 25 must successfully complete either an entire minor and adult driver education course or an entire driver education course exclusively for adults in order to obtain a driver's license and that a person must be at least 18 years of age to be issued an ADE-1317 certificate. In response to public comment, a change was made at adoption to replace the term "syllabus" with "course curriculum content."

New subparagraphs (A)-(C) were added to subsection (c)(1) to detail the requirements for course submission and approval of a six-semester-hour instructor development course, a nine-semester-hour instructor development course, and a supervising instructor development course.

Subsection (c)(2) was amended to reduce the number of penalty points allowed on the personal driving records of students in a driver education instructor development course from 10 to 6 within the preceding 36 months. The subsection was also amended to require schools to use standards for assessing penalty points as found in the Texas Transportation Code.

Subsection (c)(5) was amended to clarify provisions relating to instruction conducted by a driver education teacher, supervising teaching assistant-full, and teaching assistant. In response to public comment, a change was made at adoption to remove the proposed requirement that a supervising teaching assistant-full or a supervising driver education teacher teach at least 25 percent of an instructor development course. This requirement was not adopted due to the current shortage of supervising teachers in the state.

Subsections (c)(6) and (d)(5) were amended to require driver education schools to submit dates, times, locations, and other pertinent information to the TEA at least ten days prior to teaching an instructor development course or a continuing education course.

Section 176.1008, Student Enrollment Contracts, was amended to allow for the use of electronic signatures on enrollment contracts and include additional information required to be in an enrollment contract, including the school's termination policy, the amount of time a student has to complete classroom instruction, and the rates for classroom and in-car lessons that correspond to actual instructional costs. In addition, the adopted amendment references the ADE-1317 certificate, requires that students be provided with a copy of the contract if they are age 18 or older, and provides for the use of a group contract for schools offering a driver education course exclusively for adults. The section was modified at adoption to remove proposed language requiring a parent to initial his or her understanding that a refund may not be forthcoming if the student withdraws prior to course completion. It was determined by TEA legal counsel that the requirement should be removed since it would allow schools to retain tuition in certain circumstances when tuition should be refunded.

Section 176.1010, Attendance and Makeup, was amended to allow for the use of electronic signatures on student records, clarify that the allowable times for driver education training are specific to instruction provided by the school, and limit the contractual timeline to complete a minor and adult driver education course to one year.

Section 176.1012, Cancellation and Refund Policy, was amended to add the requirement that refunds must correspond with actual instructional hours not provided. In addition, the interest rate on unpaid refunds was changed from 250 percent to 20 percent to better correspond with the current prime rate.

Section 176.1013, Facilities and Equipment, was amended to clarify that an office or classroom facility of any driver education program may not be in a private residence.

Section 176.1015, Student Complaints, was amended to delete the requirement that student records be maintained and available for review. The requirement continues to be stated elsewhere in driver training rules.

Section 176.1016, Records, was amended to specify that either written or electronic daily records of attendance may be used.

Language relating to the individual student record form (classroom) was also clarified.

Section 176.1018, Driver Education Certificates (DE-964), was amended to include ADE-1317 certificates. The section title was also amended to include ADE-1317 certificates. The requirement that school owners keep the TEA copies of DE-964 forms was deleted. (The DE-964 was redesigned and no longer includes a TEA copy.)

New §176.1019, Alternative Method of Instruction for Driver Education Course, was added to provide for alternative methods of instruction (AMI) for a driver education course. This section allows the commissioner to approve the course content and delivery method of a driver education course. Driver education school owners will submit the course to the TEA for review and approval. The new section provides detailed criteria acceptable for the driver education AMI. The criteria is consistent with the criteria already used for approval of driving safety courses offered by alternative delivery method (ADM).

For organizational purposes, current §176.1019 was repealed and renumbered as new §176.1020, Application Fees and Other Charges. Language in subsections (a), (b), (c), (d)(1)-(15), and (e) under new §176.1020 reflects no changes from the current rule. Changes from the current rule were the addition of fees for ADE-1317 certificates in paragraph (16) and application for approval of AMI courses in paragraphs (17) and (18) and traditional and online driver education courses exclusively for adults in paragraphs (19) and (20), respectively. The fees are consistent with those already in place for similar types of certificates and course approvals.

Technical edits were also made throughout the subchapter.

Subchapter BB, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driving Safety Schools and Course Providers

Section 176.1101, Definitions, was amended to clarify the term "new course."

Section 176.1103, Driving Safety School Licensure, was amended to clarify the effective date of school licensure and delete a circumstance under which the TEA may declare a school closed.

Section 176.1104, Course Provider Licensure, was amended to clarify the effective date of course provider licensure and require course providers to submit a new continuing education course upon license renewal.

Section 176.1105, Driving Safety School and Course Provider Responsibilities, was amended to increase the number of days allowed for a course provider to electronically submit certificate data to the TEA and require that uniform certificates of course completion contain TEA complaint contact information. In addition, a cross reference to a statute that no longer applies was deleted. In response to public comment, new subsection (b)(11) was modified at adoption to specify that the front of each uniform certificate of course completion must contain TEA complaint contact information and current division telephone number in a font that is visibly recognizable.

Section 176.1106, Administrative Staff Members, was amended to allow TEA compliance visits to be announced or unannounced.

Section 176.1107, Driving Safety Instructor License, was amended to allow a specialized driving safety instructor, specialized driving safety instructor trainer, or an instructor development course specialized driving safety instructor trainer applicant to receive credit for past certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor. The section was also amended to require the driving safety instructor trainer, specialized driving safety instructor trainer, instructor development course driving safety instructor trainer, or instructor development course specialized driving safety instructor trainer for a newly approved course to demonstrate the ability to teach the instructor training course. Provisions prohibiting an instructor from making inappropriate advances and allowing the commissioner to suspend, revoke, or deny a license to any driving safety or specialized driving safety instructor trainer or instructor who uses inappropriate language or behavior were added. In addition, an outdated statutory reference was deleted.

Section 176.1108, Driving Safety Courses of Instruction, was amended to allow ADMs an exception from the requirement that all course content be delivered under the direct observation of a licensed instructor and require course content to contain appropriate language. In addition, changes were made to clarify submission of translator credentials or other requirements for translation of course content into languages other than English; require statistical data to be drawn from the Texas Department of Transportation or National Highway Traffic Safety Administration; specify that all driving safety course content must be current with regard to data, laws, procedures, and methodology; require courses to contain the top five contributing factors of motor vehicle crashes as identified by the Texas Department of Transportation; and add course topics for motorcycle awareness and driving distractions. The requirement that a course author be a TEA-licensed instructor was removed, clarification on the due date of course renewal was added, and a requirement that course content methodology and procedures be updated for course renewal was added. Language was deleted that requires an instructor to evaluate a continuing education course, and a provision was added to allow the TEA to approve a continuing education course presented by technology if it meets certain criteria. In addition, a cross-reference to subclauses within the section was corrected. In response to public comment, subsection (a)(1)(J)(i) was modified at adoption to clarify that a course owner shall update all course content methodology with the latest available data. In addition, a technical edit was made at adoption to correct grammar in subsection (a)(3)(A)(iii)(V).

Section 176.1109, Specialized Driving Safety Courses of Instruction, was amended to require course content to contain appropriate language and clarify submission of translator credentials or other requirements for translation of course content into languages other than English. Changes were also made to require statistical data to be drawn from the Texas Department of Transportation or National Highway Traffic Safety Administration, update course authorship requirements, delete language that requires an instructor to evaluate a continuing education course, and allow the TEA to approve a continuing education course presented by technology if it meets certain criteria. In addition, a cross-reference to subclauses within the section was corrected.

Section 176.1110, Alternative Delivery Methods of Driving Safety Instruction, would be amended to add references to 19 TAC §176.1109 and update cross-references relating to mastery of course content. Requirements would be added to specify that student activity in an ADM must be documented and include the date and time and that an ADM presented over the Internet must display the school name, school license number, course provider

name, and course provider license number on the homepage and registration page. A change was made to require, rather than allow, a specified number of minutes for relevant videos. The amendment also clarified the due date of ADM renewal. In response to public comment, subsection (f)(6) was modified at adoption to clarify where course identification information must be displayed for ADMs presented over the Internet.

Section 176.1113, Facilities and Equipment, was amended to specify that the TEA will not approve any facility that contains an adult-oriented business or a facility that is required to exclude patrons because of age.

Section 176.1114, Student Complaints, was amended to require that uniform certificates of course completion contain TEA complaint contact information. In response to public comment, subsection (c) was modified at adoption to correspond with the change to §176.1105(b)(11) made at adoption.

Section 176.1117, Uniform Certificate of Course Completion for Driving Safety or Specialized Driving Safety Course, was amended to delete the requirement that a course provider must retain voided certificates for three years and remove an unnecessary cross-reference.

Technical edits were also made throughout the subchapter.

The adopted revisions add no new reporting requirements for school districts. Driver training school owners already track the issuance of certificates, and the adopted revisions add no new reporting requirements. The procedural changes parallel those already found in the driver education rules and in driving safety rules for ADMs.

The adopted revisions have no locally maintained paperwork requirements.

The TEA determined that there may be direct adverse economic impact for small businesses and microbusinesses providing driving instruction under the Texas Transportation Code, §521.205. No regulatory flexibility analysis will be conducted under the Texas Government Code, §2006.002. The revisions are explicitly required by state mandate. There is no flexibility in implementing these new statutory requirements; therefore, no regulatory flexibility analysis can be performed.

The public comment period on the proposal began September 24, 2010, and ended October 25, 2010. Following is a summary of public comments received and the corresponding agency responses regarding proposed revisions to 19 TAC Chapter 176, Driver Training Schools, Subchapter AA, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools, and Subchapter BB, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driving Safety Schools and Course Providers.

Subchapter AA, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools

Comment. A driver education school owner commented that the definition of the term "teacher of record" in proposed new §176.1001(20) indicated that a driver education school could open without a teacher of record.

Agency Response. The agency disagrees. According to the TEC, a school cannot be issued a license without a teacher of record.

Comment. A driver education school owner commented that rules should be added to require the teacher of record to either live in the town in which the school is located or observe a class once a year to ensure the school is providing proper instruction.

Agency Response. The agency disagrees. There is no statutory authority to require the teacher of record to live in the city in which the school is located or observe a class once a year. It is the responsibility of the teacher of record and the school owner to ensure proper instruction is being provided at the school.

Comment. A driver education school owner commented that in emergency situations as described in §176.1006(c)(4)(B), a school should be permitted six months to establish a new teacher of record.

Agency Response. The agency disagrees that a specific time period should be established in rule. The agency will continue to evaluate emergency situations on an individual basis.

Comment. A driver education school owner recommended a change in bond amounts and fees for opening an initial driver education school.

Agency Response. The agency disagrees. Bond amounts and fees are established by the TEC.

Comment. An individual commented that the proposed language in §176.1007(b)(1)(A) and (D) that would allow students age 14 to under 25 years of age to take a minor and adult driver education course should be amended. The commenter stated that persons 25 years of age and older may take a minor and adult course.

Agency Response. The agency agrees. Section 176.1007(b)(1)(A) and (D) was modified at adoption to specify the age requirement for persons who may enroll in a minor and adult driver education course as age 14 and over.

Comment. An individual commented that the requirement in proposed new §176.1007(b)(2)(A) and (B)(x) that a person be at least 18 years of age to enroll in a driver education course exclusively for adults should be removed. The commenter stated that the Texas Transportation Code, §521.1601(2), requires a person to be 18 years of age or older to present a certificate of completion for a course approved under the TEC, §1001.101(a)(2), but that the agency is not authorized to limit enrollment in an adult course. In addition, the commenter stated that enrollment should be allowed for a person who is 17 years of age and within 3 months of his or her 18th birthday.

Agency Response. The agency disagrees. The phrase "driver education course exclusively for adults," as used in the TEC, specifically excludes non-adults from taking the course. In other instances, such as the TEC, §1001.101(a)(1), the term "minor and adult" is used specifically to allow adults to take what was previously a teenage course. However, no such permissive language was included in the statute authorizing the driver education course exclusively for adults.

Comment. An individual commented that a content guide should be required as part of the request for approval of a driver education course exclusively for adults under proposed new §176.1007(b)(2)(A)(ii). The commenter also stated that schools should be allowed to adopt content guide materials developed by the TEA.

Agency Response. The agency agrees in part and disagrees in part. Section 176.1007(b)(2)(A)(ii) was modified at adoption to replace the term "syllabus" with the term "course curriculum content." The agency disagrees with the development of content guide materials by the TEA. The TEA does not have the

resources to create such materials and is not statutorily required to do so.

Comment. An individual commented that the driver education school late renewal fee is excessive and should be reduced from $200 to $100.

Agency Response. The agency disagrees. The fee is designed as a deterrent for late submission of renewal applications. If a school owner submits a timely application, there is no late fee.

Comment. An individual commented that language in proposed new §176.1007(b)(2)(B)(vi)(II) should be amended to allow an online course to ask at least 1 course validation question for each multimedia clip of more than 60 seconds upon completion of the multimedia presentation, during an end-of-chapter segment assessment or quiz, or during the final comprehensive examination.

Agency Response. The agency disagrees. The purpose of this requirement is to ensure the student is participating in the course when asked to watch a video that is more than 60 seconds in length. If a video question is answered incorrectly, the student is required to watch the video again. If the question regarding the video were to be asked at a later time in the course and the student incorrectly answered the question, the student would then be required to return to the section of the course where the video was shown and watch the video again. The agency has determined that, since this is a participation question and not a content question, asking it following the video will keep the student engaged in the course. The language in this rule is consistent with the approval process for ADM driving safety courses.

Comment. An individual commented that proposed new §176.1007(b)(4), which states that a licensed school or instructor may not issue an adult driver education certificate (ADE-1317) to a person who is not at least 18 years of age, should not be adopted.

Agency Response. The agency disagrees. A person who is not at least 18 years of age may not take the driver education course exclusively for adults, and a licensed school or instructor may not issue a certificate of completion to anyone who has not completed the appropriate course.

Comment. An individual commented that language should be added to §176.1007(c) to require a driver education school owner to submit a description of the plan to be followed when training a driver education teacher, teaching assistant-full, and teaching assistant.

Agency Response. The agency disagrees. Requirements for driver education instructor development courses were already addressed in the proposed amendment to §176.1007.

Comment. An individual commented that the minimum percentage of time a supervising driver education teacher or supervising teaching assistant-full is required to teach a driver education instructor development course should be revised.

Agency Response. The agency agrees. Due to the shortage of supervising teachers in the state, the proposed requirement in §176.1007(c)(5) that a supervising teaching assistant-full or a supervising driver education teacher teach at least 25 percent of an instructor development course was not adopted.

Comment. An individual commented that driver education attendance and makeup requirements in §176.1010 should be more lenient. The commenter recommended increasing the limit on hours of training from five to six hours per day, increasing the limit on classroom makeup work to two hours per day, reducing the limit on hours each student is allowed to be absent to eight hours, and deleting the requirement that a student whose classroom enrollment is terminated for violating the attendance policy may not reenter before the start of the next new class.

Agency Response. The agency disagrees. The purpose of the rule is to maintain the sequencing of the uniform beginning and ending dates for driver education classroom instruction. In addition, the rule ensures that students attend classroom instruction provided by an instructor. The changes recommended by the commenter would deteriorate the classroom sequencing and the presentation of curriculum as recommended by the Program of Organized Instruction and allow a student to complete all classroom instruction via take-home makeup assignments.

Subchapter BB, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driving Safety Schools and Course Providers

Comment. The president of DefensiveDriving.com commented that proposed new §176.1105(b)(11) should be amended to specify how the TEA complaint contact information should be displayed on uniform certificates of course completion.

Agency Response. The agency agrees. Section 176.1105(b)(11) was modified at adoption to specify that the front of each uniform certificate of course completion must contain TEA complaint contact information and current division telephone number in a font that is visibly recognizable. In addition, similar language in §176.1114(c) was modified at adoption for consistency.

Comment. The state program and contract relations director for the National Safety Council commented that §176.1108(a)(1)(C) should include data maintained by the National Safety Council.

Agency Response. The agency disagrees. The National Safety Council is a licensing course provider regulated by the TEA, and the agency will not require other course providers to use statistical information maintained by a competitor.

Comment. The president of DefensiveDriving.com commented that §176.1108(a)(1)(J)(i) is unclear and that the term "course content" should be included for clarification.

Agency Response. The agency agrees. Section 176.1108(a)(1)(J)(i) was modified at adoption to clarify that a course owner shall update all course content methodology with the latest available data.

Comment. The president of DefensiveDriving.com commented that §176.1110(c)(2) should be amended to allow the ADM to draw personal validation questions from one third party data source rather than two data sources as is currently required. The commenter stated that the change would provide financial relief to course providers as well as flexibility should a data source go out of business or merge with another data source.

Agency Response. The agency disagrees. The rulemaking process specified in Texas Government Code, §§2001.023-2001.026, requires that the public be given fair notice of substantive rule changes. As no notice was given concerning modification of the use of data sources for personal validation questions, such a change cannot be made until public notice of a proposed change is given.

Comment. The president of DefensiveDriving.com commented that proposed new §176.1110(f)(6) should be more specific

about how certain information must be displayed on an ADM website. The commenter stated that without specific instructions, required information could be displayed in a manner that requires manipulation by the end user to see the information. The commenter recommended that ADMs be required to display the course provider name and number in the top left-hand portion of the webpages defined by the TEA.

Agency Response. The agency agrees. Section 176.1110(f)(6) was modified at adoption to clarify where course identification information must be displayed for ADMs presented over the Internet.

General Comments

Comment. An individual recommended extending the licensure period from two to four years for providing the drug and alcohol awareness program.

Agency Response. The comment is outside the scope of the current rule proposal. Rules on drug and alcohol awareness programs are addressed in 19 TAC Chapter 176, Driver Training Schools, Subchapter CC, Commissioner's Rules on Minimum Standards for Operation of Texas Drug and Alcohol Driving Awareness Program.

SUBCHAPTER AA. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF LICENSED TEXAS DRIVER EDUCATION SCHOOLS

19 TAC §§176.1001, 176.1003, 176.1004, 176.1006 - 176.1008, 176.1010, 176.1012, 176.1013, 176.1015, 176.1016, 176.1018 - 176.1020

The amendments and new rules are adopted under the TEC, §1001.052, which requires the agency to adopt and administer comprehensive rules governing driving safety courses; §1001.053, which requires the commissioner of education to adopt and enforce rules necessary to administer driver and traffic safety education. Section 1001.053 authorizes the commissioner to adopt rules to ensure the integrity of approved driving safety courses and to enhance program quality; §1001.101, as amended by HB 339 and HB 2730, 81st Texas Legislature, 2009, which authorizes the commissioner by rule to establish or approve the curriculum and designate the textbooks to be used in a driver education course for minors and adults, including a driver education course conducted by a school district, driver education school, or parent or other individual under Texas Transportation Code, §521.205. Section 1001.101 requires that the driver education course include 7 hours of behind-the-wheel instruction and 7 hours of observation instruction in the presence of a person who holds a driver education instructor license or who meets the requirements of the Texas Transportation Code, §521.205, and an additional 20 hours of behind-the-wheel instruction, including at least 10 hours that takes place at night, in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2); §1001.101, as amended by SB 1317, 81st Texas Legislature, 2009, which requires the commissioner by rule to establish the curriculum and designate the educational materials to be used in a driver education course for minors and adults and a driver education course exclusively for adults. Section 1001.101 specifies certain requirements for the driver education course exclusively for adults; §1001.1015, which requires the commissioner by rule to establish the curriculum and designate the educational materials to be used in a driver education course exclusively for adults; §1001.1025, which requires the agency by rule to require that information relating to motorcycle awareness, the dangers of failing to yield the right-of-way to a motorcyclist, and the need to share the road with motorcyclists be included in the curriculum of any driver education course or driving safety course; §1001.110, which requires the commissioner by rule to require that information relating to the effect of using a wireless communication device or engaging in other actions that may distract a driver on the safe or effective operation of a motor vehicle be included in the curriculum of each driver education course or driving safety course; and §1001.257, which states that the commissioner may not issue or renew a driver education instructor license, including a temporary license, to a person who has six or more points assigned to the person's driver's license under Texas Transportation Code, Chapter 708, Subchapter B.

The amendments and new rules implement the TEC, §§1001.052; 1001.053; 1001.101, as amended by HB 339 and HB 2730, 81st Texas Legislature, 2009; 1001.101, as amended by SB 1317, 81st Texas Legislature, 2009; 1001.1015; 1001.1025; 1001.110; and 1001.257.

§176.1007. Courses of Instruction.

(a) The educational objectives of driver training courses shall include, but not be limited to, promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of driver education and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating development of traffic-related competencies through education, including, but not limited to, Texas traffic laws, risk management, driver attitudes, courtesy skills, and evasive driving techniques.

(b) This subsection contains requirements for driver education courses. All course content and instructional material shall include current statistical data, references to law, driving procedures, and traffic safety methodology. For each course, curriculum documents and materials may be requested as part of the application for approval.

(1) Minor and adult driver education course.

(A) The driver education classroom phase for students age 14 and over shall consist of:

(i) a minimum of 32 hours of classroom instruction. The in-car phase must consist of seven hours of behind-the-wheel instruction and seven hours of in-car observation in the presence of a person who holds a driver education instructor license; and

(ii) 20 hours of behind-the-wheel instruction, including at least 10 hours of nighttime instruction, in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). The 20 hours of instruction must be endorsed by a parent or legal guardian if the student is a minor. Simulation hours shall not be substituted for these 20 hours of instruction. Driver education training endorsed by the parent is limited to one hour per day.

(B) Schools are allowed five minutes of break per instructional hour for all phases. No more than ten minutes of break time may be accumulated for each two hours of instruction.

(C) Driver education course curriculum content, minimum instruction requirements, and administrative guidelines for classroom instruction, in-car training (behind-the-wheel and observation), simulation, and multicar range shall include the educational objectives established by the commissioner of education in the Program of Organized Instruction in Driver Education and Traffic Safety (POI) and

meet the requirements of this subchapter. In addition, the educational objectives that must be provided to every student enrolled in a minor and adult driver education course shall include information relating to litter prevention, anatomical gifts, leaving children in vehicles unattended, distractions, motorcycle awareness, and alcohol awareness and the effect of alcohol on the effective operation of a motor vehicle.

(D) Driver education schools that desire to instruct students age 14 and over shall provide the same beginning and ending dates for each student in the same class of 36 or less. No student shall be allowed to enroll and start the classroom phase after the sixth hour of classroom instruction has been completed.

(E) Students shall proceed in the sequence identified by and approved for that school.

(F) Students shall receive classroom instruction from an instructor who is approved and licensed by TEA. An instructor shall be in the classroom and available to students during the entire 32 hours of instruction, including self-study assignments. Instructors shall not have other teaching assignments or administrative duties during the 32 hours of classroom instruction.

(G) Motion picture films, photographic slides, videos, tape recordings, guest speakers, and other instructional media that present concepts required in the POI may be used as part of the required 32 hours of classroom instruction. These instructional aids shall not exceed 640 minutes of the total 32 hours.

(H) Self-study assignments occurring during regularly scheduled class periods shall not exceed 25% of the course and shall be presented to the entire class simultaneously.

(I) Each classroom student shall be provided a driver education textbook designated by the commissioner or access to instructional materials that are in compliance with the POI approved for the school. Instructional materials, including textbooks, must be in a condition that is legible and free of obscenities.

(J) A copy of the current edition of the "Texas Driver Handbook" or instructional materials that are equivalent shall be furnished to each student enrolled in the classroom phase of the driver education course.

(K) Each student, including makeup students, shall be provided their own seat and table or desk while receiving classroom instruction. A school shall not enroll more than 36 students, excluding makeup students, and the number of students may not exceed the number of seats and tables or desks available at the school.

(L) When a student changes schools, the school must follow the current transfer policy developed by TEA and Texas Department of Public Safety (DPS).

(M) All classroom phases of driver education, including makeup work, shall be completed within the timelines stated in the original student contract. This shall not circumvent the attendance and progress requirements.

(N) All in-car lessons shall consist of actual driving instruction. No school shall permit a ratio of more than four students per instructor or exceed the seating and occupant restraint capacity of the vehicle used for instruction. Schools that allow one-on-one instruction shall notify the parents in the contract.

(O) A student must have a valid driver's license or instruction permit in his or her possession during any behind-the-wheel instruction.

(P) All in-car instruction provided by the school shall begin no earlier than 5:00 a.m. and end no later than 11:00 p.m. The division may approve exceptions; however, the request shall be made in writing by the school owner or school director and include acknowledgment by all parents in the form of signatures.

(Q) A school may use multimedia systems, simulators, and multicar driving ranges for in-car instruction in a driver education program. Each simulator, including the filmed instructional programs, and each plan for a multicar driving range must meet state specification developed by DPS and TEA. A licensed driver education instructor must be present during use of multimedia systems, simulators, and multicar driving ranges.

(R) Four periods of at least 55 minutes per hour of instruction in a simulator may be substituted for 1 hour of behind-the-wheel instruction and 1 hour of in-car observation. Two periods of at least 55 minutes per hour of multicar driving range instruction may be substituted for 1 hour of behind-the-wheel instruction and 1 hour of in-car observation relating to elementary or city driving lessons. However, a minimum of four hours must be devoted to actual behind-the-wheel instruction.

(S) A driver education program may be scheduled with the classroom phase of instruction presented in block form prior to the in-car phase or concurrently with the in-car phase. Under the block and concurrent programs, a student may apply to the DPS for an instruction permit after completing all of the required classroom instruction or after completing six hours of classroom instruction devoted to the instructional objectives of classroom instruction designated by the commissioner found in Module One: Traffic Laws.

(T) A student issued a DE-964 under the block and concurrent programs must subsequently complete the required classroom instruction. If a student does not subsequently complete the required class instruction, the instructor must complete DPS Form DL-42 and send it to the DPS division responsible for license and driver records. Form DL-42 should be prepared as soon as it is evident the student will not complete the required hours of instruction. The DPS may then revoke the student's instruction permit.

(U) Driver education instruction is limited to eligible students who are at least 14 years of age when the driver education classroom phase begins and who will be 15 years of age or older when the behind-the-wheel and multicar range instruction begins.

(V) Each school owner that teaches driver education courses shall collect adequate student data to enable TEA to evaluate the overall effectiveness of the driver education course in reducing the number of violations and accidents of persons who successfully complete the course. The commissioner may determine a level of effectiveness that serves the purposes of Texas Education Code (TEC), Chapter 1001.

(2) Driver education course exclusively for adults. Courses offered in a traditional classroom setting or online to persons who are age 18 to under 25 years of age for the education and examination requirements for the issuance of a driver's license under Texas Transportation Code, §521.222(c) and §521.1601, must be offered in accordance with the following guidelines.

(A) Traditional approval process. The commissioner may approve a driver education course exclusively for adults to be offered traditionally if the course meets the following requirements.

(i) Application. The driver education school shall submit a completed application along with the appropriate fee.

(ii) Request for approval. The request for approval must include course curriculum content, list of instructional materials, contract, and instructional records.

(iii) School license required. A person or entity offering a driver education course exclusively for adults must hold a driver education school license.

(iv) Instructor license required. Students shall receive classroom instruction from a licensed supervising teacher, driver education teacher, or teaching assistant-full.

(v) Minimum course content. The driver education course exclusively for adults shall consist of six clock hours of classroom instruction that meets the following topics.

(I) Course introduction--ten minutes. Objective: The student recognizes the value of legal and responsible reduced-risk driving practices and accepts driving as a privilege with responsibilities, obligations, and potential consequences.

(II) Your license to drive--minimum of 20 minutes. Objective: The student reduces risk and accepts driving as a privilege by legally and responsibly possessing a driver's license, registering and having a current inspection on a motor vehicle, and obeying the Safety Responsibility Act.

(III) Right-of-way--minimum of 50 minutes. Objective: The student reduces risk by legally and responsibly accepting or yielding the right-of-way.

(IV) Traffic control devices--minimum of 40 minutes. Objective: The student reduces risk by legally and responsibly applying knowledge and understanding of traffic control devices.

(V) Controlling traffic flow--minimum of 40 minutes. Objectives: The student reduces risk by legally and responsibly applying knowledge and understanding of laws and procedures for controlling traffic flow.

(VI) Alcohol and other drugs--minimum of 50 minutes. Objective: The student legally and responsibly performs reduced-risk driving practices by adopting zero-tolerance driving and lifestyle practices related to the use of alcohol and other drugs and applying knowledge and understanding of alcohol and other drug laws, regulations, penalties, and consequences.

(VII) Cooperating with other roadway users--minimum of 20 minutes. Objective: The student reduces risk by legally and responsibly cooperating with law enforcement and other roadway users, including vulnerable roadway users in emergency and potential emergency situations.

(VIII) Managing risk--minimum of 50 minutes. Objective: The student reduces and manages risk by legally and responsibly understanding the issues commonly associated with motor vehicle collisions, including poor decision making, risk taking, impaired driving, distractions, speed, failure to use a safety belt, driving at night, and using a wireless communications device while operating a vehicle.

(IX) Classroom progress assessment--25 minutes (this shall be the last unit of instruction). The remaining 25 minutes of instruction shall be allocated to the topics included in the minimum course content under subclauses (II)-(VIII) of this clause.

(vi) Course management. An approved adult driver education course shall be presented in compliance with the following guidelines.

(I) Students shall receive classroom instruction from a licensed supervising teacher, driver education teacher, or teaching assistant-full. The instructor shall be physically present in appropriate proximity to the student for the type of instruction being given. The teacher of record shall sign all completed classroom instruction records provided by a teaching assistant-full.

(II) A copy of the current edition of the "Texas Driver Handbook" or study material that is equivalent shall be furnished to each student enrolled in the course.

(III) Self-study assignments, motion picture films, photographic slides, videos, tape recordings, guest speakers, and other instructional media that present topics required in the course shall not exceed 120 minutes of instruction.

(IV) Each student, including makeup students, shall be provided their own seat and table or desk while receiving classroom instruction. A school shall not enroll more than 36 students, excluding makeup students, and the number of students may not exceed the number of seats and tables or desks available at the school.

(V) All classroom instruction, including makeup work, shall be completed within the timelines stated in the original student contract.

(VI) A minimum of 330 minutes of instruction is required.

(VII) The total length of the course shall consist of a minimum of 360 minutes.

(VIII) Thirty minutes of time, exclusive of the 330 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content.

(IX) Students shall not receive a driver education certificate of completion unless that student receives a grade of at least 70% on the highway signs examination and at least 70% on the traffic laws examination as required under Texas Transportation Code, §521.161.

(X) The driver education school shall make a material effort to establish the identity of the student.

(B) Online approval process. The commissioner may approve a driver education course exclusively for adults to be offered online if the course meets the following requirements.

(i) Application. The driver education school shall submit a completed application along with the appropriate fee.

(ii) Request for approval. The request for approval must include a syllabus cross-reference, contract, and instructional records.

(iii) School license required. A person or entity offering an online driver education course exclusively for adults must hold a driver education school license.

(I) The driver education school shall be responsible for the operation of the online course.

(II) Students shall receive classroom instruction from a licensed supervising teacher, driver education teacher, or teaching assistant-full.

(iv) Course content. The online course must meet the requirements of the course identified in the TEC, §1001.101(a)(2).

(I) Course topics. The course requirements described in subparagraph (A)(v) of this paragraph shall be met.

(II) Length of course. The course must be 6 hours in length, which is equal to 360 minutes. A minimum of 330 minutes of instruction must be provided. Thirty minutes of time, exclusive of the 330 minutes of instruction, shall be dedicated to break

periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(III) Required material. A copy of the current edition of the "Texas Driver Handbook" or study material that is equivalent shall be furnished to each student enrolled in the course.

(IV) Editing. The material presented in the online course shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(V) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the course. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the course.

(VI) Minimum content. The online course shall present sufficient content so that it would take a student 360 minutes to complete the course. In order to demonstrate that the online course contains sufficient minutes of instruction, the online course shall use the following methods.

(-a-) Word count. For written material that is read by the student, the course shall contain the total number of words in the written sections of the course. This word count shall be divided by 180, the average number of words that a typical student reads per minute. The result is the time associated with the written material for the sections.

(-b-) Multimedia presentations. For multimedia presentation, the online course shall calculate the total amount of time it takes for all multimedia presentations to play, not to exceed 120 minutes.

(-c-) Charts and graphs. The online course may assign one minute for each chart or graph.

(-d-) Time allotment for questions. The online course may allocate up to 60 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(-e-) Total time calculation. If the sum of the time associated with the written course material, the total amount of time for all multimedia presentations, and the time associated with all charts and graphs equals or exceeds 330 minutes, the online course has demonstrated the required amount of minimum content.

(-f-) Alternate time calculation method. In lieu of the time calculation method, the online course may submit alternate methodology to demonstrate that the online course meets the 330-minute requirement.

(v) Personal validation. The online course shall maintain a method to validate the identity of the person taking the course. The personal validation system shall incorporate one of the following requirements.

(I) School-initiated method. Upon approval by the TEA, the online course may use a method that includes testing and security measures that are at least as secure as the methods available in the traditional classroom setting. The method must meet the following criteria.

(-a-) Time to respond. The student must correctly answer a personal validation question within 60 seconds.

(-b-) Placement of questions. At least two personal validation questions shall appear randomly during each instructional hour, not including the final examination.

(-c-) Exclusion from the course. The online course shall exclude the student from the course after the student has incorrectly answered more than 30% of the personal validation questions.

(-d-) Correction of answer. The online course may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons why the answer was corrected.

(II) Third party data method. The online course shall ask a minimum of 12 personal validation questions randomly throughout the course from a bank of at least 20 questions drawn from a third party data source. The method must meet the following criteria.

(-a-) Time to respond. The student must correctly answer a personal validation question within 60 seconds.

(-b-) Placement of questions. At least two personal validation questions shall appear randomly during each instructional hour, not including the final examination.

(-c-) Exclusion from the course. The online course shall exclude the student from the course after the student has incorrectly answered more than 30% of the personal validation questions.

(-d-) Correction of answer. The online course may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons why the answer was corrected.

(vi) Content validation. The online course shall incorporate a course content validation process that verifies student participation and comprehension of course material, including the following.

(I) Timers. The online course shall include built-in timers to ensure that 330 minutes of instruction have been attended and completed by the student.

(II) Testing the student's participation in multimedia presentations. The online course shall ask at least 1 course validation question following each multimedia clip of more than 60 seconds.

(-a-) Test bank. For each multimedia presentation that exceeds 60 seconds, the online course shall have a test bank of at least 4 questions.

(-b-) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(-c-) Failure criteria. If the student fails to answer the question correctly, the online course must require the student to view the multimedia clip again. The online course shall then present a different question from its test bank for that multimedia clip. The online course may not repeat a question until it has asked all the questions from its test bank.

(-d-) Answer identification. The online course shall not identify the correct answer to the multimedia question.

(III) Course participation questions. The online course shall test the student's course participation by asking at least two questions from each of the seven topics listed in subparagraph (A)(v)(II)-(VIII) of this paragraph.

(-a-) Test bank. The test bank for course participation questions shall include at least ten questions from each of the seven topics identified in subparagraph (A)(v)(II)-(VIII) of this paragraph.

(-b-) Placement of questions. The course participation questions shall be asked at the end of the major unit or section in which the topic is covered.

(-c-) Question difficulty. Course participation questions shall be of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(IV) Comprehension of course content. The online course shall test the student's mastery of the course content by administering at least 30 questions covering the highway signs and traffic laws required under Texas Transportation Code, §521.161.

(-a-) Test banks (two). Separate test banks for course content mastery questions are required for the highway signs and traffic laws examination as required under Texas Transportation Code, §521.161, with examination questions drawn equally from each.

(-b-) Placement of questions. The mastery of course content questions shall be asked at the end of the course (comprehensive final examination).

(-c-) Question difficulty. Course content mastery questions shall be of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(vii) Retest the student. If the student misses more than 30% of the questions asked on an examination, the online course shall retest the student using different questions from its test bank. The student is not required to repeat the course, but may be allowed to review the course prior to retaking the examination. If the student fails the comprehensive final examination three times, the student shall fail the course.

(viii) Student records. The online course shall provide for the creation and maintenance of the records documenting student enrollment, the verification of the student's identity, and the testing of the student's mastery of the course material. The school shall also ensure that the student record is readily, securely, and reliably available for inspection by a TEA representative. The student records shall contain the following information:

(I) the student's first, middle, and last name;

(II) the student's date of birth and gender;

(III) a record of all questions asked and the student's responses;

(IV) the name or identity number of the staff member entering comments, retesting, or revalidating the student;

(V) both answers and a reasonable explanation for the change if any answer to a question is changed by the school for a student who inadvertently missed a question; and

(VI) a record of the time the student spent in each unit and the total instructional time the student spent in the course.

(ix) Waiver of certain education and examination requirements. A licensed driver education instructor must determine that the student has successfully completed and passed a driver education course exclusively for adults prior to waiving the examination requirements of the highway sign and traffic law parts of the examination required under Texas Transportation Code, §521.161, and signing the ADE-1317 driver education completion certificate.

(x) Age requirement. A person must be at least 18 years of age to enroll in a driver education course exclusively for adults.

(xi) Issuance of certificate. Not later than the 15th working day after the course completion date, the school shall issue an ADE-1317 driver education certificate only to a person who successfully completes an approved online driver education course exclusively for adults.

(xii) Access to instructor. The school must establish hours that the student may access the instructor. With the exception of circumstances beyond the control of the school, the student shall have access to the instructor during the specified hours.

(xiii) Additional requirements for online courses.

(I) Re-entry into the course. An online course may allow the student re-entry into the course by username and password authentication or other means that are as secure as username and password authentication.

(II) Navigation. The student shall be provided orientation training to ensure easy and logical navigation through the course. The student shall be allowed to freely browse previously completed material.

(III) Audio-visual standards. The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(IV) Domain names. Each school offering an online course must offer that online course from a single domain. The online course may accept students that are redirected to the online course domain, as long as the school license number appears on the source that redirects the student to the online course domain. The student must be redirected to a webpage that clearly identifies the licensed school offering the online course before the student begins the registration process, supplies any information, or pays for the course.

(3) Compliance with Texas Transportation Code, §521.1601. Persons age 18 to under 25 years of age must successfully complete either a minor and adult driver education course or the driver education course exclusively for adults. Partial completion of either course does not satisfy the requirements of rule or law.

(4) Issuance of certificate. A licensed school or instructor may not issue an ADE-1317 adult driver education certificate to a person who is not at least 18 years of age.

(c) This subsection contains requirements for driver education instructor development courses. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. If the course meets the minimum requirements set forth in this subchapter, the division may grant an approval. Schools desiring to provide driver education instructor development courses shall provide an application for approval that shall be in compliance with this section.

(1) Schools desiring to obtain approval for a driver education instructor development course shall request an application for approval from TEA. All instructor development curricula submitted for approval shall meet or exceed the requirements set forth for approved programs offered at colleges, universities, school districts, or educational service centers and shall be specific to the area of specialization. Guidelines and criteria for the course shall be provided with the application packet, and the school shall meet or exceed the criteria outlined.

(A) Six-semester-hour instructor development course. The driver education instructor development program instructional objectives must be equivalent to 6 semester hours or 90 clock hours of driver and traffic safety education instructor training and shall include:

(i) Driver Education I--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the Highway Transportation System (HTS) in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Driver Education I;

(II) minor and adult driver education curriculum overview and course goals;

(III) school and instructor liability and responsibility;

(IV) student evaluation and assessment;

(V) instructor conduct, including professionalism and public relations;

(VI) rules, codes, and standards for driver education programs; and

(VII) classroom progress examination for Driver Education I.

(ii) Driver Education II--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety for in-car instruction. Instruction shall address the following topics:

(I) overview of Driver Education II;

(II) minor and adult driver education in-car curriculum overview;

(III) commentary driving techniques;

(IV) factors that influence learning and habit formation;

(V) in-car lesson planning, including scheduling and designing;

(VI) vocabulary and communication;

(VII) risk management;

(VIII) general guidelines for conducting behind-the-wheel and in-car observation;

(IX) in-car debriefing techniques;

(X) proper record keeping and maintenance;

(XI) classroom progress examination for Driver Education II; and

(XII) in-car laboratory, including:

(-a-) initial assessment of trainee's driving skills by instructor trainer;

(-b-) observation of in-car teaching techniques as given by a licensed instructor;

(-c-) practice of instructor risk-management and emergency procedures, including taking control of the vehicle under the supervision and observation of a licensed instructor;

(-d-) in-car trainee student teaching under the supervision and observation of a licensed instructor; and

(-e-) trainee in-car student teaching final progress assessment under the supervision and observation of a licensed instructor.

(B) Nine-semester-hour instructor development course. The driver education instructor development program instructional objectives must be equivalent to 9 semester hours or 135 clock hours of driver and traffic safety education instructor training and shall include:

(i) all requirements set forth in subparagraph (A) of this paragraph; and

(ii) Driver Education III--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety for classroom instruction. Instruction shall address the following topics:

(I) overview of Driver Education III;

(II) classroom delivery, including TEC, rules, standards, and school administrative procedures;

(III) student learning styles;

(IV) classroom management and student discipline;

(V) classroom lesson planning and designing;

(VI) scheduling driver education programs;

(VII) proper record keeping and maintenance;

(VIII) simulation theory and multicar range instruction;

(IX) instructor professional growth;

(X) classroom progress examination for Driver Education III; and

(XI) classroom laboratory, including:

(-a-) observation of classroom teaching techniques as given by a licensed instructor; and

(-b-) classroom practice student teaching under the supervision and observation of a licensed instructor.

(C) Supervising instructor development course. The supervising driver education instructor development program instructional objectives must be equivalent to 6 semester hours or 90 clock hours of driver and traffic safety education instructor training and shall include:

(i) training in administering driver education programs and supervising and administering traffic safety education;

(ii) Supervising Instructor I--minimum of 45 clock hours. Instructional objectives: the instructor shall acquire the knowledge, skills, and understanding to instruct trainees in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Supervising Instructor I;

(II) minor and adult driver education curriculum overview and course goals;

(III) rules, codes, and standards for driver education programs;

(IV) learning styles;

(V) factors that influence learning and habit formation;

(VI) vocabulary and communication;

(VII) lesson plan development;

(VIII) classroom management and student discipline; and

(IX) classroom progress examination for Supervising Instructor I; and

(iii) Supervising Instructor II--minimum of 45 clock hours. Instructional objectives: the instructor shall acquire the knowl-

edge, skills, and understanding to instruct trainees in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Supervising Instructor II;

(II) student evaluation and assessment;

(III) commentary driving techniques;

(IV) in-car debriefing techniques;

(V) scheduling driver education programs;

(VI) proper record keeping and maintenance;

(VII) school and instructor liability and responsibility;

(VIII) instructor conduct, including professionalism and public relations;

(IX) risk management;

(X) simulation theory and multicar range;

(XI) professional growth;

(XII) classroom progress examination for Supervising Instructor II; and

(XIII) classroom laboratory, including:

(-a-) observation of nine-semester-hour driver education instructor development course classroom teaching techniques as given by a licensed instructor; and

(-b-) classroom practice student teaching of a nine-semester-hour driver education instructor development course under the supervision and observation of a licensed instructor.

(2) Prior to enrolling a student in a driver education instructor development course, the school owner or representative must obtain proof that the student has a high school diploma or equivalent. A copy of the evidence must be placed on file with the school. Further, the school shall obtain and evaluate a current official driving record from the student prior to enrollment. The individual must not have accumulated 6 or more penalty points on a driving record during the preceding 36-month period. The school must use the standards for assessing penalty points for convictions of traffic law violations and accident involvements established under Texas Transportation Code, Chapter 708, Subchapter B.

(3) Instruction records shall be maintained by the school and supervising teacher for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; name and instructor license number of the person conducting the training; and dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course, the supervising teacher conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing, and one copy will be maintained in a permanent file at the school.

(4) All student instruction records submitted for the approved instructor development courses shall be original documents.

(5) A properly licensed supervising driver education teacher or supervising teaching assistant-full shall teach the 6-semester-hour, 9-semester-hour, and supervising instructor development courses. The supervising teacher may allow a driver education teacher, teaching assistant-full, or teaching assistant to provide training under the direction of the supervising teacher in areas appropriate for their level of certification and/or licensure. The supervising teacher is responsible for certifying all instruction conducted by the driver education teacher, teaching assistant-full, or teaching assistant, including independent study and research assignments, which shall not exceed 25% of the total training program time.

(6) Schools desiring to teach driver education instructor development courses shall either submit course offerings as a part of the school application or, if offered periodically, submit the dates, times, locations, and scheduled instructors' names and license numbers at least ten days before teaching the course.

(d) This subsection contains requirements for driver education continuing education courses.

(1) Driver education school owners may receive an approval for a four-hour continuing education course and provide the approved course to instructors to ensure that instructors meet the requirements for continuing education.

(2) The request for course approval shall contain the following:

(A) a description of the plan by which the course will be presented;

(B) the subject of each unit;

(C) the educational objectives of each unit;

(D) time to be dedicated to each unit;

(E) instructional resources for each unit, including names or titles of presenters and facilitators; and

(F) a plan by which the school owner will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course.

(3) A continuing education course may be approved if TEA determines that:

(A) the course constitutes an organized program of learning that enhances the instructional skills, methods, or knowledge of a licensed driver education instructor;

(B) the course pertains to subject matters that relate directly to the practice of driver education instruction, instruction techniques, or driver education-related subjects; and

(C) the entire course shall be taught by individuals with recognized experience or expertise in the area of driver education or related subjects. The division may request evidence of the individuals' experience or expertise.

(4) Driver education school owners may not offer the same continuing education course to instructors each year. In order to continue to offer a course, a new or revised continuing education course shall be submitted to TEA for approval.

(5) Driver education school owners must notify the division of the scheduled dates, times, and locations of all continuing education courses at least ten days prior to teaching the course.

(e) A branch school may offer only a course that is approved for the primary school.

(f) Schools applying for approval of additional courses after the original approval has been granted shall submit the documents designated by the division with the appropriate fee. Courses shall be ap-

proved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(g) If an approved course is discontinued, the division shall be notified within five days of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division, the refunds must be made no later than 30 days after the course was discontinued. Any course discontinued shall be removed from the school's approval.

(h) If, upon review and consideration of an original, renewal, or amended application for course approval, the commissioner determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(i) The commissioner may revoke approval of a school's courses under certain circumstances, including, but not limited to, the following.

(1) Information contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the instructors, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school offers a course which has not been approved or for which there are no instructors or equipment.

(4) The school has been found to be in violation of TEC, Chapter 1001, and/or this chapter.

§176.1008. Student Enrollment Contracts.

(a) A legal written or electronic student enrollment contract shall be executed prior to the school's receipt of any money. Electronic signatures shall comply with Texas Business and Commerce Code, Chapter 322.

(b) All driver education student enrollment contracts shall contain at least the following:

(1) the student's legal name;

(2) the student's driver's license number (if applicable);

(3) the student's address, including city, state, and zip code;

(4) the student's telephone number;

(5) the student's date of birth;

(6) the full legal name and license number of the primary school or the branch school;

(7) the specific course to be taught;

(8) the agreed total contract charges that itemize all tuition, fees, and other charges;

(9) the terms of payment;

(10) the number of classroom lessons;

(11) the length of each lesson and course;

(12) the school's cancellation, termination, and refund policy;

(13) a statement indicating the specific location, date, and time that classroom instruction is scheduled to begin; the date classroom instruction is scheduled to end; and the amount of time a student has to complete all classroom instruction, makeup assignments, and in-car instruction;

(14) the number of in-car lessons;

(15) the rate per classroom lesson that corresponds to actual instructional costs;

(16) the rate per in-car lesson that corresponds to actual instructional costs;

(17) the rates for use of a school car for a road test (if an extra charge is made);

(18) a statement that the school maintains a business insurance policy for vehicles with coverage as required by Texas Transportation Code, Chapter 601, and uninsured or underinsured coverage;

(19) the signature of a school representative; and

(20) the student's signature or, if the driver education student is younger than 18, the signature of the parent or guardian. The signature of the parent or guardian is not required for an individual younger than 18 who is, or has been, married or whose disabilities of minority have been removed generally by law. Instead, such an individual shall:

(A) present a marriage certificate or a divorce decree (but not an annulment decree) or other satisfactory evidence of marriage or of having been married; or

(B) present a court order showing removal of disabilities of minority; or

(C) present a notarized parental authorization.

(c) In addition, all driver education student enrollment contracts shall contain statements substantially as follows.

(1) I have been furnished a copy of the school tuition schedule; cancellation and refund policy; and school regulations pertaining to absence, grading policy, progress, and rules of operation and conduct.

(2) The school is prohibited from issuing a DE-964 or ADE-1317 if the student has not met all of the requirements for course completion, and the student should not accept a DE-964 or ADE-1317 under such circumstances.

(3) This agreement constitutes the entire contract between the school and the student, and assurances or promises not contained herein shall not bind the school or the student.

(4) I further realize that any grievances not resolved by the school may be forwarded to Driver Training, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The current telephone number of the division shall also be provided.

(d) A copy of the enrollment contract shall be delivered to:

(1) the student, if 18 years of age or older; or

(2) the parent or guardian that signed the contract.

(e) A copy of each enrollment contract shall be a part of the student files maintained by all driver education schools.

(f) Schools shall submit proposed or amended enrollment contracts to the division.

(g) Student enrollment contracts used at branch schools must be those approved for use at the primary school.

(h) Driver education courses exclusively for adults may use a group contract that includes more than one student's name.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006993
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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Proposal publication date: September 24, 2010
For further information, please call: (512) 475-1497

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19 TAC §176.1019

The repeal is adopted under the TEC, §1001.052, which requires the agency to adopt and administer comprehensive rules governing driving safety courses; and §1001.053, which requires the commissioner of education to adopt and enforce rules necessary to administer driver and traffic safety education. Section 1001.053 authorizes the commissioner to adopt rules to ensure the integrity of approved driving safety courses and to enhance program quality.

The repeal implements the TEC, §1001.052 and §1001.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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SUBCHAPTER BB. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF LICENSED TEXAS DRIVING SAFETY SCHOOLS AND COURSE PROVIDERS

19 TAC §§176.1101, 176.1103 - 176.1110, 176.1113, 176.1114, 176.1117

The amendments are adopted under the TEC, §1001.052, which requires the agency to adopt and administer comprehensive rules governing driving safety courses; §1001.053, which requires the commissioner of education to adopt and enforce rules necessary to administer driver and traffic safety education. Section 1001.053 authorizes the commissioner to adopt rules to ensure the integrity of approved driving safety courses and to enhance program quality; §1001.1025, which requires the agency by rule to require that information relating to motorcycle awareness, the dangers of failing to yield the right-of-way to a motorcyclist, and the need to share the road with motorcyclists be included in the curriculum of any driver education course or driving safety course; and §1001.110, which requires the commissioner by rule to require that information relating to the effect of using a wireless communication device or engaging in other actions that may distract a driver on the safe or effective operation of a motor vehicle be included in the curriculum of each driver education course or driving safety course.

The amendments implement the TEC, §§1001.052, 1001.053, 1001.1025, and 1001.110.

§176.1105. Driving Safety School and Course Provider Responsibilities.

(a) Course providers must be located, or maintain a registered agent, in the State of Texas. All instruction in a driving safety or specialized driving safety course shall be performed in locations approved by the Texas Education Agency (TEA) and by TEA-licensed instructors. However, a student instructor trainee may teach the 12 hours necessary for licensing in a TEA-approved location under the direction and in the presence of a licensed driving safety or specialized driving safety instructor trainer who has been trained in the curriculum being instructed.

(b) Each course provider or employee shall:

(1) ensure that instruction of the course is provided in schools currently approved to offer the course, and in the manner in which the course was approved;

(2) ensure that the course is provided by persons who have a valid current instructor license with the proper endorsement issued by the division, except as provided in subsection (a) of this section;

(3) ensure that schools and instructors are provided with the most recent approved course materials and relevant data and information pertaining to the course within 60 days of approval. Instructor training may be required and shall be addressed in the approval notice;

(4) not falsify driver training records;

(5) ensure that applications for licenses or approvals are forwarded to TEA within ten days of receipt at the course provider facilities;

(6) ensure that instructor performance is monitored. A written plan describing how instructor performance will be monitored and evaluated shall be provided to the schools. The plan shall identify the criteria upon which the instructors will be evaluated, the procedure for evaluation, the frequency of evaluation (a minimum of once a year), and the corrective action to be taken when instructors do not meet the criteria established by the course provider. The instructor evaluation forms must be kept on file either at the course provider or school location for a period of one year;

(7) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(8) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students;

(9) develop and maintain a TEA-approved method for printing and issuing original and duplicate uniform certificates of course completion that, to the greatest extent possible, prevents the unauthorized production or misuse of the certificates;

(10) report original and duplicate certificate data, by secure electronic transmission, to TEA within 30 days of issue using guidelines established and provided by TEA. The issue date indicated on the certificate shall be the date the course provider mails the certificate to the student; and

(11) ensure that the front of each uniform certificate of course completion contains TEA complaint contact information and current division telephone number in a font that is visibly recognizable.

(c) Each driving safety school owner-operator or employee shall:

(1) ensure that each individual permitted to give instruction at the school or any classroom location has a valid current instructor's license with the proper endorsement issued by the division, except as provided in subsection (a) of this section;

(2) prohibit an instructor from giving instruction or prohibit a student from securing instruction in the classroom or in a motor vehicle if that instructor or student is using or exhibits any evidence or effect of an alcoholic beverage, controlled substance, drug, abusable glue, aerosol paint, or other volatile chemical as those terms are defined in the Texas Alcoholic Beverage Code, §1.04(1); and the Texas Health and Safety Code, §481.002 and §485.001;

(3) provide instruction or allow instruction to be provided only in courses that are currently on the school's list of approved courses;

(4) complete, issue, or validate a verification of course completion only for a person who has successfully completed the entire course;

(5) not falsify driver training records;

(6) ensure that instructors give students the opportunity to evaluate the course and instructor on an official evaluation form;

(7) evaluate instructor performance in accordance with the course provider plan;

(8) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(9) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students; and

(10) pay a fee to the course provider that is equal to the fee paid by the course provider to TEA for course completion certificate numbers for original certificates provided for the students of that school within seven calendar days of the date each student successfully completes the driving safety course.

(d) For the purposes of Texas Education Code, Chapter 1001, and this chapter, each person employed by or associated with any driving safety school shall be deemed an agent of the driving safety school, and the school may share the responsibility for all acts performed by the person which are within the scope of the employment and which occur during the course of the employment.

§176.1108. Driving Safety Courses of Instruction.

(a) This section contains requirements for driving safety, continuing education, and instructor development courses. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. Except as provided by §176.1110 of this title (relating to Alternative Delivery Methods of Driving Safety Instruction), all course content shall be delivered under the direct observation of a licensed instructor. Courses of instruction shall not be approved that contain language that a reasonable and prudent individual would consider inappropriate. Any changes and updates to a course shall be submitted by the course provider and approved prior to being offered. Approval will be revoked for any course that meets the definition of inactive as defined in §176.1101 of this title (relating to Definitions).

(1) Driving safety courses.

(A) Educational objectives. The educational objectives of driving safety courses shall include, but not be limited to promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of drivers and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating continuing development of traffic-related competencies.

(B) Driving safety course content guides. A course content guide is a description of the content of the course and the techniques of instruction that will be used to present the course. For courses offered in languages other than English, the course owner shall provide a copy of the student verification of course completion document and/or enrollment contract, student instructional materials, final examination, and evaluation in the proposed language accompanied by a statement from a translator with current credentials from the American Translators Association or the National Association of Judicial Interpreters and Translators that the materials are the same in both languages. In lieu of the specified credentials, a translator's credentials shall be presented to Texas Education Agency (TEA) for approval with the final determination based solely on TEA's interpretation. To be approved, each course owner shall submit as part of the application a course content guide that includes the following:

(i) a statement of the course's traffic safety goal and philosophy;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The policies and administrative provisions shall be used by each school that offers the course and include the following requirements:

(I) progress standards that meet the requirements of subparagraph (F) of this paragraph;

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the course must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) if the student does not complete the entire course, including all makeup lessons, within the timeline specified by the court, no credit for instruction shall be granted;

(IV) any period of absence for any portion of instruction will require that the student complete that portion of instruction. All makeup lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(V) conditions for dismissal and conditions for re-entry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the course and the furniture deemed necessary to accommodate the students in the course such as tables,

chairs, and other furnishings. The course shall include a minimum of 60 minutes of audio/video materials relevant to the required topics; however, the audio/video materials shall not be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) written or printed materials to be provided for use by each student as a guide to the course. The division may make exceptions to this requirement on an individual basis;

(vii) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions, etc.). When small-group discussions are planned, the course content guide shall identify the questions that will be assigned to the groups;

(viii) instructional resources for each unit;

(ix) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the course guide. The evaluative technique may be used throughout the unit or at the end; and

(x) a completed form cross-referencing the instructional units to the topics identified in subparagraph (D) of this paragraph. A form to cross-reference the instructional units to the required topics and topics unique to the course will be provided by the division.

(C) Course and time management. Approved driving safety courses shall be presented in compliance with the following guidelines and shall include statistical information drawn from data maintained by the Texas Department of Transportation or National Highway Traffic Safety Administration.

(i) A minimum of 300 minutes of instruction is required.

(ii) The total length of the course shall consist of a minimum of 360 minutes.

(iii) Sixty minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(iv) Administrative procedures such as enrollment shall not be included in the 300 minutes of the course.

(v) Courses conducted in a single day in a traditional classroom setting shall allow a minimum of 30 minutes for lunch.

(vi) Courses taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day courses. However, all breaks shall be provided after the course introduction and prior to the last unit of the instructional day or the comprehensive examination and summation, whichever is appropriate.

(vii) The order of topics shall be approved by TEA as part of the course approval, and for each student, the course shall be taught in the order identified in the approved application.

(viii) Students shall not receive a uniform certificate of course completion unless that student receives a grade of at least 70% on the final examination.

(ix) In a traditional classroom setting, there must be sufficient seating for the number of students, arranged so that all students are able to view, hear, and comprehend all instructional aids and the class shall have no more than 50 students.

(x) The driving safety instructor or school shall make a material effort to establish the identity of the student.

(D) Minimum course content. Driving Safety course content, including video and multimedia, shall include current statistical data, references to law, driving procedures, and traffic safety methodology. A driving safety course shall include, as a minimum, materials adequate to assure the student masters the following.

(i) Course introduction--minimum of ten minutes (instructional objective--to orient students to the class). Instruction shall address the following topics:

(I) purpose and benefits of the course;

(II) course and facilities orientation;

(III) requirements for receiving course credit;

(IV) student course evaluation procedures; and

(V) TEA-provided information on course content.

(ii) The traffic safety problem--minimum of 15 minutes (instructional objectives--to develop an understanding of the nature of the traffic safety problem and to instill in each student a sense of responsibility for its solution). Instruction shall address the following topics:

(I) identification of the overall traffic problem in the United States, Texas, and the locale where the course is being taught;

(II) death, injuries, and economic losses resulting from motor vehicle crashes in Texas; and

(III) the top five contributing factors of motor vehicle crashes in Texas as identified by the Texas Department of Transportation.

(iii) Factors influencing driver performance--minimum of 20 minutes (instructional objective--to identify the characteristics and behaviors of drivers and how they affect driving performance). Instruction shall address the following topics:

(I) attitudes, habits, feelings, and emotions (aggressive driving, etc.);

(II) alcohol and other drugs;

(III) physical condition (drowsy driving, etc.);

(IV) knowledge of driving laws and procedures; and

(V) understanding the driving task.

(iv) Traffic laws and procedures--minimum of 30 minutes (instructional objectives--to identify the requirements of, and the rationale for, applicable driving laws and procedures and to influence drivers to comply with the laws on a voluntary basis). Instruction shall address the following topics:

(I) passing;

(II) right-of-way;

(III) turns;

(IV) stops;

(V) speed limits;

(VI) railroad crossings safety, including statistics, causes, and evasive actions;

(VII) categories of traffic signs, signals, and highway markings;

(VIII) pedestrians;

(IX) improved shoulders;

(X) intersections;

(XI) occupant restraints;

(XII) anatomical gifts;

(XIII) litter prevention;

(XIV) law enforcement and emergency vehicles (this category will be temporary until the need is substantiated by documentation from the Department of Public Safety on the number of deaths or injuries involved because of improper procedures used by a citizen when stopped by a law enforcement officer); and

(XV) other laws as applicable (i.e., financial responsibility/compulsory insurance).

(v) Special skills for difficult driving environments--minimum of 20 minutes (instructional objectives--to identify how special conditions affect driver and vehicle performance and identify techniques for management of these conditions). Instruction shall address the following topics:

(I) inclement weather;

(II) traffic congestion;

(III) city, urban, rural, and expressway environments;

(IV) reduced visibility conditions--hills, fog, curves, light conditions (darkness, glare, etc.), etc.; and

(V) roadway conditions.

(vi) Physical forces that influence driver control--minimum of 15 minutes (instructional objective--to identify the physical forces that affect driver control and vehicle performance). Instruction shall address the following topics:

(I) speed control (acceleration, deceleration, etc.);

(II) traction (friction, hydroplaning, stopping distances, centrifugal force, etc.); and

(III) force of impact (momentum, kinetic energy, inertia, etc.).

(vii) Perceptual skills needed for driving--minimum of 20 minutes (instructional objective--to identify the factors of perception and how the factors affect driver performance). Instruction shall address the following topics:

(I) visual interpretations;

(II) hearing;

(III) touch;

(IV) smell;

(V) reaction abilities (simple and complex); and

(VI) judging speed and distance.

(viii) Defensive driving strategies--minimum of 40 minutes (instructional objective--to identify the concepts of defensive driving and demonstrate how they can be employed by drivers to reduce the likelihood of crashes, deaths, injuries, and economic losses). Instruction shall address the following topics:

(I) trip planning;

(II) evaluating the traffic environment;

(III) anticipating the actions of others;

(IV) decision making;

(V) implementing necessary maneuvers;

(VI) compensating for the mistakes of other drivers;

(VII) avoiding common driving errors;

(VIII) interaction with other road users (motorcycles, bicycles, trucks, pedestrians, etc.);

(IX) motorcycle awareness, including the dangers of failing to yield the right-of-way to a motorcyclist and the need to share the road with motorcyclist; and

(X) distractions relating to the effect of using a wireless communication device, including texting or engaging in other actions that may distract a driver from the safe or effective operation of a motor vehicle.

(ix) Driving emergencies--minimum of 40 minutes (instructional objective--to identify common driving emergencies and their countermeasures). Instruction shall address the following topics:

(I) collision traps (front, rear, and sides);

(II) off-road recovery, paths of least resistance; and

(III) mechanical malfunctions (tires, brakes, steering, power, lights, etc.).

(x) Occupant restraints and protective equipment--minimum of 15 minutes (instructional objective--to identify the rationale for having and using occupant restraints and protective equipment). Instruction shall address the following topics:

(I) legal aspects;

(II) vehicle control;

(III) crash protection;

(IV) operational principles (active and passive);

(V) helmets and other protective equipment; and

(VI) dangers involved in locking or leaving children in vehicles unattended.

(xi) Alcohol and traffic safety--minimum of 40 minutes (instructional objective--to identify the effects of alcohol on roadway users). Instruction shall not address methods to drink and drive but shall address the following topics related to the effects of alcohol on roadway users:

(I) physiological effects;

(II) psychological effects;

(III) legal aspects; and

(IV) synergistic effects.

(xii) Comprehensive examination--minimum of five minutes (this shall be the last unit of instruction).

(xiii) The remaining 30 minutes of instruction shall be allocated to the topics included in the minimum course content or to additional driving safety topics that satisfy the educational objectives of the course.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved driving safety course described in the applicant's driving safety course content guide. Each course provider shall submit as part of the application an instructor training guide that is bound or hole-punched and placed in a binder and that has a cover and a table of contents. The guide shall include the following:

(i) a statement of the philosophy and instructional goals of the training course;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the course curriculum;

(II) training the trainee in the techniques of instruction that will be used in the course;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the course curriculum by the trainee under the observation of the instructor trainer as part of the basic training course;

(VI) time to be dedicated to each training lesson; and

(VII) a minimum of 600 minutes of instruction of the course in a regular approved course under the observation of a licensed instructor trainer. The instructor trainee shall provide instruction for two full courses. It is not mandatory that the two courses be taught as two complete courses; however, every instructional unit shall be taught twice; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)-(VI) of this subparagraph. The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When small-group discussions are planned, the course guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Examinations. Each course provider shall submit for approval, as part of the application, tests designed to measure the comprehension level of students at the completion of the driving safety course and the instructor training course. The comprehensive examination for each driving safety course must include at least 2 questions from the required units set forth in subparagraph (D)(ii)-(xi) of this paragraph for a total of at least 20 questions. The final examination questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors shall not assist students in answering the final examination questions, but may facilitate alternative testing. Instructors may not be certified or students given credit for the driving safety course unless they score 70% or more on the final test. The course content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the final examination. The applicant may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Test questions may be short answer, multiple choice, essay, or a combination of these forms.

(G) Student course evaluation. Each student in a driving safety course shall be given an opportunity to evaluate the course and the instructor on an official evaluation form. A master copy of the evaluation form will be provided to TEA.

(H) State-level evaluation of driving safety courses. Each course provider shall collect adequate student data to enable TEA to evaluate the overall effectiveness of a course in reducing the number of violations and accidents of persons who successfully complete the course. The commissioner of education may determine a level of effectiveness that serves the purposes of Texas Education Code (TEC), Chapter 1001.

(I) Requirements for authorship. The course materials shall be written by individuals or organizations with recognized experience in writing instructional materials.

(J) Renewal of course approval. The course approval must be renewed every two years. The renewal document due date shall be March 1 of every even numbered calendar year.

(i) For approval, the course owner shall update all the course content methodology, procedures, statistical data, and references to law with the latest available data.

(ii) The course owner shall submit a Statement of Assurance stating that the course has been updated to reflect the latest applicable laws and statistics.

(iii) Failure to make necessary changes or to submit a Statement of Assurance documenting those changes shall be cause for revocation of the course approval.

(iv) The commissioner may alter the due date of the renewal documents by giving the approved course six months' notice. The commissioner may alter the due date in order to ensure that the course is updated six months after the effective date of new state laws passed by the Texas Legislature.

(2) Instructor development courses.

(A) If the alternative instructor training in §176.1107(c)(1) of this title (relating to Driving Safety Instructor License) is not applicable, driving safety instructors shall successfully complete 36 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development course for the driving safety course to be taught, under the supervision of a driving safety instructor trainer. Supervision is considered to have occurred when

the instructor trainer is present and personally provides the 36 clock hours of training for driving safety instructors, excluding those clock hours approved by TEA staff that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and instructor trainer for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course, the instructor trainer conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing, and one copy will be maintained in a permanent file at the course provider location.

(C) All student instruction records submitted for the TEA-approved instructor development course shall be signed by the course provider. Original documents shall be submitted.

(D) Driving safety instructor development courses may be offered at approved classroom facilities of a licensed school which is approved to offer the driving safety course being taught. A properly licensed instructor trainer shall present the course.

(E) Applicants shall complete 36 hours of training in the driving safety curriculum that shall be taught. Of the 36 hours, 24 shall cover techniques of instruction and in-depth familiarization with materials contained in the driving safety curriculum. The additional 12 hours shall consist of practical teaching with students and shall occur after the first 24 hours have been completed.

(F) The driving safety course provider shall submit dates of instructor development course offerings for the 24-hour training that covers techniques of instruction and in-depth familiarization with the material contained in the driving safety curriculum, locations, class schedules, and scheduled instructor trainers' names and license numbers before the courses are offered. The 12-hour practical-teaching portion of the instructor development course shall be provided at properly licensed schools or classrooms approved to offer the course being provided.

(3) Continuing education courses.

(A) Continuing education requirements include the following.

(i) Each course provider will be responsible for receiving an approval for a minimum of a two-hour continuing education course. Each instructor currently endorsed to teach the course must attend the approved continuing education course conducted by the course provider.

(ii) The request for course approval shall contain the following:

(I) a description of the plan by which the course will be presented;

(II) the subject of each unit;

(III) the instructional objectives of each unit;

(IV) time to be dedicated to each unit;

(V) instructional resources for each unit, including names or titles of presenters and facilitators;

(VI) any information that TEA mandates to promote the quality of the education being provided; and

(VII) a plan by which the course provider will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course.

(iii) A continuing education course may be approved if TEA determines that:

(I) the course is designed to enhance the instructional skills, methods, or knowledge of the driving safety instructor;

(II) the course pertains to subject matters that relate directly to driving safety instruction, instruction techniques, or driving safety-related subjects;

(III) the course has been designed, planned, and organized by the course provider. The course provider shall use licensed driving safety instructors to provide instruction or other individuals with recognized experience or expertise in the area of driving safety instruction or driving safety-related subject matters. Evidence of the individuals' experience or expertise may be requested by the division;

(IV) the course contains updates or approved revisions to the driving safety course curriculum, policies or procedures, and/or any changes to the course, that are affected by changes in traffic laws or statistical data; and

(V) any technology used to present a continuing education course meets reasonable standards for determining attendance, security, and testing.

(B) Course providers shall notify the division of the scheduled dates, times, and locations of all continuing education courses prior to the first day of class.

(b) Course providers shall submit documentation on behalf of schools applying for approval of additional courses after the original approval has been granted. The documents shall be designated by the division and include the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved course is discontinued, the division shall be notified within five days of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division, the refunds must be made no later than 30 days after the course was discontinued. Any course discontinued shall be removed from the list of approved courses.

(d) If, upon review and consideration of an original, renewal, or amended application for course approval, the commissioner determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The commissioner may revoke approval of any course given to a course owner, provider, or school under any of the following circumstances.

(1) Any information contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of TEC, Chapter 1001, and/or this chapter.

(4) The course has been found to be ineffective in meeting the educational objectives set forth in subsection (a)(1)(A) of this section.

§176.1110. Alternative Delivery Methods of Driving Safety Instruction.

(a) Approval process. The commissioner of education may approve an alternative delivery method (ADM) that delivers an approved driving safety course or an approved specialized driving course and meets the following requirements.

(1) Standards for approval. The commissioner may approve an ADM for an approved driving safety course or a specialized driving safety course and waive any rules to accomplish this approval if the ADM delivers an approved course in a manner that is at least as secure as a traditional classroom. ADMs that meet the requirements outlined in subsections (b)-(h) of this section shall receive ADM approval.

(2) Application. The course provider shall submit a completed ADM application along with the appropriate fee. The application for ADM approval shall be treated the same as an application for the approval of a new course and the ADM must deliver the course provider's approved curriculum as delineated in the course content guide required by §176.1108(a)(1)(B) of this title (relating to Driving Safety Courses of Instruction) and §176.1109(a)(1)(B) of this title (relating to Specialized Driving Safety Courses of Instruction).

(3) Incomplete applications. An application that is incomplete may be returned to the applicant along with the application fee.

(4) School license required. A person or entity offering a driving safety course or a specialized driving course to Texas students by an alternative delivery method must hold a driving safety school license. The driving safety school is responsible for the operation of the ADM.

(5) Course provider endorsement required. The driving safety school must have an endorsement from a licensed course provider.

(b) Course content. The ADM must deliver the same topics and course content as the approved course.

(1) Course topics. The time requirements for each unit and the course as a whole described in §176.1108(a)(1)(C) and (D) and §176.1109(a)(1)(C) and (D) of this title shall be met.

(2) Topic sequence. The ADM sequencing may be different from the approved traditional course as long as the sequencing does not detract from educational value of the course. The ADM owner shall provide a key showing the topic sequence of the traditional course and where the corresponding information appears in the ADM.

(3) Editing. The material presented in the ADM shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(4) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the course. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the course.

(5) Minimum content. The ADM shall present sufficient content so that it would take a student 300 minutes to complete the course. In order to demonstrate that the ADM contains sufficient content, the ADM shall use the following methods.

(A) Word count. For written material that is read by the student, the course provider shall count the total number of words in the written sections of the course. This word count shall be divided by 180, the average number of words that a typical student reads per minute. The result is the time associated with the written material for the sections.

(B) Multimedia presentations. For multimedia presentation, the course provider shall calculate the total amount of time it takes for all multimedia presentations to play.

(C) Charts and graphs. The ADM may assign one minute for each chart or graph.

(D) Examinations. The course provider may allocate up to 90 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(E) Total time calculation. If the sum of the time associated with the written course material, the total amount of time for all multimedia presentations, and the time associated with all charts and graphs equals or exceeds 300 minutes, the ADM has demonstrated the required amount of content.

(F) Alternate time calculation method. In lieu of the time calculation method, the ADM may submit alternate methodology to demonstrate that the ADM meets the 300-minute requirement.

(6) Student breaks. A course that demonstrates that it contains 300 minutes of instructional content shall mandate that students take 60 minutes of break time or provide additional educational content for a total of 360 minutes.

(c) Personal validation. The ADM shall maintain a system to validate the identity of the person taking the course. The personal validation system shall incorporate the following requirements.

(1) Personal validation questions. The ADM shall ask a minimum of 10 personal validation questions throughout the course.

(2) Third party data sources. The personal validation questions shall be drawn equally from at least two different databases.

(3) Time to respond. The student must correctly answer the personal validation question within 90 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(4) Placement of questions. At least one personal validation question shall appear in each major unit or section, not including the final examination.

(5) Exclusion from the course. The ADM shall exclude the student from the course after the student has incorrectly answered more than 30 percent of the personal validation questions.

(6) Correction of answer. The school may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons that the school corrected the answer.

(7) Student affidavits. A student for whom third-party database information is available from fewer than two databases (for example, a student with an out-of-state driver's license) may be

issued a uniform certificate of completion upon presentation to the course provider of a notarized copy of the student's driver's license or equivalent type of photo identification and a statement from the student certifying that the individual attended and successfully completed the six-hour driving safety or specialized driving safety course for which the certificate is being issued and for which there exists a corresponding student record.

(8) Alternative methods. Upon approval by the Texas Education Agency (TEA), the ADM may use alternate methods that are at least as secure as the personal validation question method.

(d) Content validation. The ADM shall incorporate a course content validation process that verifies student participation and comprehension of course material, including the following.

(1) Timers. The ADM shall include built-in timers to ensure that 300 minutes of instruction have been attended and completed by the student.

(2) Testing the student's participation in multimedia presentations. The ADM shall ask at least 1 course validation question following each multimedia clip of more than 60 seconds.

(A) Test bank. For each multimedia presentation that exceeds 60 seconds, the ADM shall have a test bank of at least 4 questions.

(B) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(C) Failure criteria. If the student fails to answer the question correctly, the ADM shall either require the student view the multimedia clip again or the ADM shall fail the student from the course. If the ADM requires the student to view the multimedia clip again, the ADM shall present a different question from its test bank for that multimedia clip. The ADM may not repeat a question until it has asked all the questions from its test bank.

(D) Answer identification. The ADM shall not identify the correct answer to the multimedia question.

(3) Mastery of course content. The ADM shall test the student's mastery of the course content by asking at least two questions from each of the topics listed in §176.1108(a)(1)(D)(ii)-(xi) and §176.1109(a)(1)(D)(ii)-(viii) of this title.

(A) Test bank. The test bank for course content mastery questions shall include at least ten questions from each of the topics identified in §176.1108(a)(1)(D)(ii)-(xi) and §176.1109(a)(1)(D)(ii)-(viii) of this title.

(B) Placement of questions. The mastery of course content questions shall be asked either at the end of the major unit or section in which the topic identified in §176.1108(a)(1)(D)(ii)-(xi) and §176.1109(a)(1)(D)(ii)-(viii) of this title is covered (unit examination) or at the end of the course (comprehensive final examination).

(C) Question difficulty. Course content mastery questions shall be short answer, multiple choice, essay, or a combination of these forms, and of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(4) Repeat and retest options. The ADM may use either of the following options for students who fail an examination to show mastery of course content, but may not use both in the same ADM.

(A) Repeat the failed unit. If the student misses more than 30% of the questions asked on an examination, the ADM shall require that the student take the unit again. All timers shall be reset. The correct answer to missed questions may not be disclosed to the student (except as part of course content). At the end of the unit, the ADM shall again test the student's mastery of the material. The ADM shall present different questions from its test bank until all the applicable questions have been asked. The student may repeat this procedure an unlimited number of times.

(B) Retest the student. If the student misses more than 30% of the questions asked on an examination, the ADM shall retest the student in the same manner as the failed examination, using different questions from its test bank. The student is not required to repeat the failed unit, but may be allowed to do so prior to retaking the examination. If the student fails the same unit examination or the comprehensive final examination three times, the student shall fail the course.

(e) Student records. The ADM shall provide for the creation and maintenance of the records documenting student enrollment, the verification of the student's identity, and the testing of the student's mastery of the course material. Each entry that verifies enrollment, identifies the question asked or the response given, documents retesting and/or revalidation, and documents any changes to the student's record shall include the date and time of the activity reported. The student records shall contain the following information.

(1) The student's name and driver's license number.

(2) A record of which personal validation questions were asked and the student's responses.

(3) A record of which multimedia participation questions were asked and the student's responses.

(4) The name or identity number of the staff member entering comments, retesting, or revalidating the student.

(5) If any answer to a question is changed by the school or course provider for a student who inadvertently missed a question, the school or course provider shall provide both answers and a reasonable explanation for the change.

(6) A record of the course content mastery questions asked and the answers given.

(7) A record of the time the student spent in each unit of the ADM and the total instructional time the student spent in the course.

(8) The school shall also ensure that the student record is readily, securely, and reliably available for inspection by TEA or a TEA-authorized representative.

(f) Additional requirements for Internet courses. Courses delivered via the Internet shall also comply with the following requirements.

(1) Re-entry into the course. An ADM may allow the student re-entry into the course by username and password authentication or other means that are as secure as username and password authentication.

(2) Navigation. The student shall be able to logically navigate through the course. The student shall be allowed to freely browse previously completed material.

(3) Audio-visual standards. The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(4) Video transcripts. If the ADM presents transcripts of a video presentation, the transcript shall be delivered concurrently with the video stream so that the transcript cannot be displayed if the video does not display on the student's computer.

(5) Domain names. Each school offering an ADM must offer that ADM from a single domain. The ADM may accept students that are redirected to the ADM's domain, as long as the student is redirected to a webpage that clearly identifies the course provider and school offering the ADM before the student begins the registration process, supplies any information, or pays for the course. Subdomains of the ADM's single domain may also accept students as long as the subdomain is registered to and hosted by the ADM and clearly identifies the official course provider, school name, and TEA registration number.

(6) Course identification. All ADMs presented over the Internet shall display the school name and school number assigned by TEA as well as the course provider name and course provider number assigned by TEA in the top left-hand portion on the entity's homepage and the registration page used by the student to pay any monies, provide any personal information, and enroll.

(g) Additional requirements for video courses.

(1) Delivery of the material. For ADMs delivered by the use of videotape, digital video disc (DVD), film, or similar media, the equipment and course materials may only be made available through a process that is approved by TEA.

(2) Video requirement. In order to meet the video requirement of §176.1108(a)(1)(B)(v) of this title, the video course shall include between 60 and 150 minutes of video that is relevant to the required topics such as video produced by other entities for training purposes, including public safety announcements and B roll footage. The remainder of the 300 minutes of required instruction shall be video material that is relevant to 1 of the 11 required topics and produced by the ADM owner, course owner, or course provider specifically for the ADM.

(A) A video ADM shall ask, at a minimum, at least 1 course validation question for each multimedia clip of more than 60 seconds at the end of each major segment (chapter) of the ADM.

(B) A video ADM shall devise and submit for approval a method for ensuring that a student correctly answers questions concerning the multimedia clips of more than 60 seconds presented during the ADM.

(h) Standards for ADMs using new technology. For ADMs delivered using technologies that have not been previously reviewed and approved by TEA, TEA may apply similar standards as appropriate and may also require additional standards. These standards shall be designed to ensure that the course can be taught by the alternative method and that the alternative method includes testing and security measures that are at least as secure as the methods available in the traditional classroom setting.

(i) Modifications to the ADM. Except as provided by paragraph (1) of this subsection, a change to a previously approved ADM shall not be made without the prior approval of TEA. The licensed course provider for the approved course on which the ADM is based shall ensure that any modification to the ADM is implemented by all schools endorsed to offer the ADM.

(1) A course provider may submit to the TEA a request for immediate implementation of a proposed change that is insignificant or that protects the interest of the consumer such that immediate implementation is warranted. The request shall include:

(A) a complete description of the proposed change;

(B) the reason for the change;

(C) the reason the requestor believes the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted; and

(D) an explanation of how the change will maintain the course or ADM in compliance with state law and the rules specified in this chapter.

(2) The TEA may request additional information regarding a proposed change from the course provider making a request under paragraph (1) of this subsection.

(3) The TEA will respond to any request made under paragraph (1) of this subsection within five working days of receipt.

(A) If the TEA determines that the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted, the requestor may immediately implement the change. The licensed course provider for the approved course on which the ADM is based shall ensure that the change is implemented by all schools endorsed to offer the ADM.

(B) If the TEA determines that the proposed change is neither insignificant nor protects the interest of the consumer such that immediate implementation is warranted, the TEA shall notify the requestor of that determination and the change may not be made unless the TEA approves the change following a complete review.

(4) A determination by the TEA to allow immediate implementation under paragraph (1) of this subsection does not constitute final approval by the TEA of the change. The TEA reserves the right to conduct further review after the change is implemented and to grant or deny final approval based on whether the change complies with state law and rules specified in this chapter.

(5) If, following further review, a change in an ADM that has been immediately implemented pursuant to paragraph (1) of this subsection is determined not to be in compliance with state law and rules specified in this chapter, the TEA:

(A) shall notify the course provider affected by the change of:

(i) the specific provisions of state law or rules with which the ADM change is not in compliance; and

(ii) a reasonable date by which the ADM must be brought into compliance;

(B) shall require the course provider to notify any school endorsed by the course provider of the finding;

(C) shall not, for the period between the implementation of the change and the date specified under subparagraph (A)(ii) of this paragraph:

(i) seek any penalty relating to the non-compliance;

(ii) take any action to revoke or deny renewal of a license of a school or course provider based on the change; or

(iii) withdraw approval of a course or ADM based on the change; and

(D) is not required to specify the method or manner by which the course provider alters the ADM to come into compliance with state law and the rules in this chapter.

(6) If the TEA allows immediate implementation pursuant to paragraph (1) of this subsection and later determines that the description of the change or the request was misleading, materially inaccurate, not substantially complete, or not made in good faith, paragraph (5)(C) of this subsection does not apply.

(7) A course provider who immediately implements a change pursuant to paragraph (1) of this subsection and fails to bring the ADM into compliance prior to the date allowed under paragraph (5)(A)(ii) of this subsection may be determined to be in violation of state law or the rules in this chapter after that date.

(8) A course provider that immediately implements a change under paragraph (1) of this subsection assumes the risk of final approval being denied and of being required to come into compliance with state law and the rules in this chapter prior to the date allowed under paragraph (5)(A)(ii) of this subsection, including bearing the cost of reversing the change or otherwise modifying the ADM to come into compliance with state law and the rules in this chapter.

(j) Termination of the school's operation. Upon termination, schools shall deliver any missing student data to TEA within five days of termination.

(k) Renewal of ADM approval. The ADM approval must be renewed every two years. The renewal document due date shall be March 1 of every even numbered calendar year.

(1) For approval, the course provider shall:

(A) update all the statistical data and references to law with the latest available data; and

(B) submit a statement of assurance that the ADM has been updated to reflect the latest applicable laws and statistics.

(2) Failure to make necessary changes or to submit a statement of assurance documenting those changes shall be cause for revocation of the ADM approval.

(3) The commissioner may alter the due date of the renewal documents by giving the approved ADM six months' notice. The commissioner may alter the due date in order to ensure that the ADM is updated six months after the effective date of new state laws passed by the Texas Legislature.

(l) Access to instructor. With the exception of circumstances beyond the control of the school, the student shall have adequate access (on the average, within two minutes) to both a licensed instructor and telephonic technical assistance (help desk) throughout the course such that the flow of instructional information is not delayed.

§176.1114. Student Complaints.

(a) The course provider shall have a written grievance procedure approved by the division director that is disclosed to all students. Driving safety schools shall follow the procedures approved for the course provider. The function of the procedure shall be to attempt to resolve disputes between students, including terminations and graduates, and the school. Adequate records shall be maintained.

(b) The driving safety school or course provider shall make every effort to resolve complaints.

(c) The front of each uniform certificate of course completion shall contain Texas Education Agency complaint contact information and current division telephone number in a font that is visibly recognizable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006992

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: December 29, 2010
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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §§153.13, 153.15, 153.17

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to 22 TAC §§153.13, 153.15, and 153.17, concerning Rules Relating to Provisions of the Texas Appraiser Licensing and Certification Act. Section 153.13 and §153.15 are adopted without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8695). Section 153.17 is adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8695). The changes to the adopted text that were not in the proposed text are as follows: In §153.17(b)(2), the deadline to provide continuing education certificates in connection with a renewal is extended to 20 days from the date of renewal, and in §153.17(b)(2)(A) the 20-day deadline to provide any requested supplemental documentation, proposed to be deleted from the rule, was restored. The revision to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed version and do not materially alter the issues raised in the proposed rules. Changes in the adopted rules result from system limitations in the Board's new licensing database with regard to tracking continuing education.

Amendments to §153.13, Educational Requirements, eliminate provisions regarding changes that became effective on November 1, 2007, as all applicants are now subject to the new requirements, and clarify the Appraisal Qualifications Board (AQB) requirements regarding distance education courses. The amendments further provide for current certified appraisers in good standing in other states to satisfy their education requirements for the same level of certification in Texas by virtue of the out-of-state certification. The amendments also introduce non-substantive changes to the section.

Amendments to §153.15, Experience Required for Certification or Licensing, implement the federal requirement that the board audit the experience of 100% of applicants for certification. The amendments also provide for current certified appraisers in good standing in other states to satisfy their experience requirements for the same level of certification in Texas by virtue of the out-of-state certification. The amendments further clarify the experience audit process.

Amendments to §153.17, Renewal or Extension of Certification and License or Renewal of Trainee Approval, consolidate the general renewal requirements into a new subsection (a) and clarify that a renewal is timely if it is complete and mailed or filed online by the expiration date. Further, the amendments modify the process for reporting continuing education to the board, discontinuing the self-reporting system validated through random audits and instead requiring the licensee to complete an appraiser continuing education report form and submit certificates of course completion. The amendments also clarify the process for reapplying for a license after expiration and make other non-substantive changes to improve readability.

The reasoned justification for the amendments as adopted is greater efficiency, clarity, and consistency in TALCB's licensing processes, as well as an enhanced ability to track licensees' continuing education.

No comments were received regarding the amendments as proposed.

The amendments are adopted under the Texas Occupations Code, §1103.151, Rules Relating to Certificates and Licenses.

The statute affected by this adoption is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the amendments.

§153.17. Renewal or Extension of Certification and License or Renewal of Trainee Approval.

(a) General Provisions.

(1) The board shall send a renewal notice to the appraiser at least 90 days prior to the expiration of the certification, license, or approval. It is the responsibility of the appraiser or trainee to apply for renewal in accordance with this chapter, and failure to receive a renewal notice from the board does not relieve the appraiser of the responsibility to timely apply for renewal.

(2) An appraiser or appraiser trainee renews the certification, license, or approval by timely filing the prescribed application for renewal, paying the appropriate fees to the board, and satisfying all applicable education and experience requirements.

(3) A renewal is timely if it is complete and, on or before the date of expiration, it is postmarked by the U.S. Postal Service, accepted by an overnight delivery service, or accepted by the agency's online renewal system.

(b) General Certification, Residential Certification, State License, and Provisional License.

(1) A certified or licensed appraiser may renew the certification or license by timely filing the prescribed application for renewal, paying the appropriate fees to the board and, unless renewing on inactive status, satisfying ACE requirements. Provisional licensees must also provide a copy of an appraisal log and experience affidavit, on forms prescribed by the board, for the period of licensure being renewed.

(2) In order to renew on active status, the applicant must complete the ACE report form approved by the board and, within 20 days of filing the renewal, submit course completion certificates for each course that was not already submitted by the provider and reflected in the applicant's electronic license record.

(A) The board may request additional verification of ACE submitted in connection with a renewal. If requested, such documentation must be provided within 20 days after the date of request.

(B) Knowingly or intentionally furnishing false or misleading ACE information in connection with a renewal is grounds for disciplinary action up to and including revocation of certification or licensure.

(3) An appraiser renewal application or extension is acceptable for processing when it is received by the board, with proper fees, and is postmarked by the U.S. Postal Service, accepted by an overnight delivery service, or entered electronically into the TexasOnline system, on or before the expiration date of the certification or license.

(A) The board may grant, at the time it issues a certification or license renewal, an extension of time of up to 60 days after the date of expiration of the previous license to complete ACE required to renew a general certification, residential certification, state license, or provisional license, provided the person:

(i) timely submits the completed renewal form with the appropriate renewal fees;

(ii) completes an extension request form; and

(iii) pays an extension fee of $200.

(B) ACE courses completed during the 60-day extension period apply only to the current renewal and may not be applied to any subsequent renewal of the license or certification.

(C) A person whose license was renewed with a 60-day ACE extension:

(i) shall not perform appraisals in a federally related transaction (FRT) until verification is received by the board that the ACE requirements have been met;

(ii) may continue to perform appraisals in non-federally related transactions (non-FRT) under the renewed license or certification;

(iii) must, within 60 days after the date of expiration of the previous license, complete the approved ACE report form and submit course completion certificates for each course that was not already submitted by the provider and reflected in the applicant's electronic license record; and

(iv) will have the renewed license or certification placed in inactive status if, within 60 days of the previous expiration date, ACE is not completed and reported in the manner indicated in paragraph (2) of this subsection. The renewed license or certification will remain on inactive status until satisfactory evidence of meeting the ACE requirements has been received by the board and the fee to return to active status required by §153.5 of this title (relating to Fees) has been paid.

(c) Appraiser Trainees.

(1) Appraiser trainees must provide a copy of an appraisal log and appraisal experience affidavits on forms prescribed by the board, for the period of authorization or approval being renewed.

(2) Appraiser trainees may not obtain an extension of time to complete required continuing education.

(d) Renewal of Licenses or Certification for Servicemen on Active Duty.

(1) A person previously licensed or certified by the board under this Act who is on active duty in the United States armed forces may renew an expired license or certification without being subject to any increase in fee imposed in his or her absence, or any additional education or experience requirements if the person:

(A) did not provide appraisal services when on active duty;

(B) provides a copy of official orders or other documentation acceptable to the board showing that the person was on active duty during the person's last renewal period;

(C) applies for the renewal within 90 days after the person's active duty ends; and

(D) pays the renewal application fees in effect when the previous license or certification expired.

(2) ACE requirements that would have been imposed for a timely renewal shall be deferred under this section for a period of up to 90 days.

(e) Expiration and Reapplication.

(1) An appraiser who wishes to become certified or licensed after the certification or license has expired must reapply for certification or licensure in accordance with the provisions of §153.9 of this title (relating to Applications). If the application is filed within one year of the expiration of a previous certification or license, the applicant shall also provide satisfactory evidence of completion of any continuing education that would have been required for a timely renewal of the previous certification or license. If the application for certification or license is filed more than one year after the expiration of the previous certification or license, the applicant must meet all then-current requirements for certification or licensure, including retaking and passing the examination.

(2) An appraiser trainee who wishes to become approved as an appraiser trainee after the approval has expired must reapply for approval as an appraiser trainee in accordance with the provisions of §153.9 of this title.

(f) Identity Theft.

(1) For purposes of this subsection "identity theft" shall mean any of the following activities occurring in connection with the rendition of real estate appraisal services:

(A) Unlawfully obtaining, possessing, transferring or using a certification, license, authorization or registration issued by the board;

(B) Unlawfully obtaining, possessing, transferring or using a person's electronic or handwritten signature.

(2) A person holding a certification, license, authorization or registration issued by the board shall implement and maintain reasonable procedures to protect and safeguard themselves from identity theft.

(3) A person holding a certification, license, authorization or registration shall notify the board if they are the victim of identity theft within 90 days of discovering such theft. Notice shall be effectuated by filing a signed, written request on a form prescribed by the board.

(4) The board may invalidate a current certification, license, authorization or registration and issue a new one to a person the board determines is a victim of identity theft. Any person seeking the invalidation of a current certification, license, authorization or registration and issuance of a new one shall submit a written, signed request on a form provided by the board for the invalidation of a current certification, license, approval, authorization or registration and issuance of a new one. The basis for the request must be identity theft, and the requestor must submit credible evidence that the person is a victim of identity theft. Without limiting the type of evidence a person may submit to the board, a court order issued in accordance with Texas Business and Commerce Code Chapter 521, Subchapter C, declaring that the person is a victim of identity theft shall constitute credible evidence. Any such court order must relate to identity theft as defined in this subsection.

(5) Engaging in identity theft in order to perform appraisals a person is not legally permitted to perform constitutes a violation of §153.20(a)(7), (20), and (22) of this title (relating to Guidelines for Revocation, Suspension, or Denial of Licensure or Certification). In addition to any action taken by the board, persons engaging in identity theft may also be referred to the appropriate law enforcement agency for criminal prosecution.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
Texas Appraiser Licensing and Certification Board
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For further information, please call: (512) 465-3938

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22 TAC §§153.19 - 153.21, 153.23, 153.25, 153.27, 153.33, 153.37

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to 22 TAC Chapter 153, §§153.19 - 153.21, 153.23, 153.25, 153.27, 153.33, and 153.37, concerning Rules Relating to Provisions of the Texas Appraiser Licensing and Certification Act. Sections 153.19 - 153.21, 153.23, 153.25, and 153.37 are adopted without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8700). Section 153.27 and §153.33 are adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8700). The changes to the adopted text that were not in the proposed text are as follows: In the first sentence of §153.27(a), the words "a valid reciprocity agreement with the board" were changed to read "reciprocity" to clarify that the Board will recognize a license or certification in another state as a basis for licensure or certification in Texas, in accordance with the federal Frank-Dodd Consumer Protection Act. Additionally, a nonsubstantive rewrite of §153.33 clarifies that certified and licensed appraisers are responsible for the totality of any report they sign. The revision to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed version and do not materially alter the issues raised in the proposed rules. Changes in the adopted rules result from efforts to clarify these provisions of the rules.

The amendments to §153.19, Licensing and Certification for Persons with Criminal Histories, reflect nonsubstantive changes to provisions regarding licensure of persons with criminal histories, including those who request the Board to make a determination

regarding their background before an application for licensure or certification is filed.

The amendments to §153.20, Guidelines for Revocation, Suspension, or Denial of Licensure or Certification, add a requirement that licensees notify the board within 30 days of disciplinary action against other occupational licenses they hold, delete provisions relating to mental illness, incorporate provisions of §153.22 relating to responding to requests for information from the board, restore certain provisions relating to conditions of probation under subsection (c), and add one additional condition of probation. The amendments also include a nonsubstantive reorganization of certain provisions.

The amendments to §153.21, Appraiser Trainees and Sponsors, clarify the responsibilities of a trainee's sponsor or authorized supervisor, omit provisions relating to requirements for licensure that are duplicative of the Appraiser Licensing and Certification Act, delete language related to changes that became effective in 2006 and 2008, change "prescribed" to "approved" regarding forms to reflect the change from promulgated application forms to forms that are approved by the board, clarify the requirement for sponsors and authorized supervisors to diligently sponsor trainees, and make other nonsubstantive changes.

The amendments to §153.23, Inactive Certificate or License, constitute a nonsubstantive rewrite of this section.

The amendments to §153.25, Temporary Non-Resident Registration, modify the terminology to refer to "temporary out-of-state registration" instead of "temporary non-resident registration" in accordance with the statutory language relating to temporary registration. The amendments also change "prescribed" to "approved" regarding forms to reflect the change from promulgated application forms to forms that are approved by the board.

The amendments to §153.27, Certification and Licensure by Reciprocity, reorganize the section for readability and delete provisions that are duplicative of Texas Occupations Code §1103.209, Reciprocal Certificate or License.

The amendments to §153.33, Signature or Endorsement of Appraisal, reorganize the section for readability and delete provisions that are duplicative of Texas Occupations Code §1103.402, Signature or Endorsement on Appraisal.

The amendments to §153.37, Offenses with Criminal, Civil, and Administrative Penalties, delete provisions that are duplicative of Texas Occupations Code, Chapter 1103, including Subchapter L, Penalties and Other Enforcement Provisions, as well as a provision that is addressed in the Penal Code.

The reasoned justification for the amendments as adopted is greater clarity, consistency, and efficiency in TALCB's licensing processes.

No comments were received regarding the amendments as proposed.

The amendments are adopted under the Texas Occupations Code, §1103.151, Rules Relating to Certificates and Licenses.

The statute affected by this adoption is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the amendments.

§153.27. Certification and Licensure by Reciprocity.

(a) A person who is licensed or certified as an appraiser under the laws of a state having reciprocity at the level of the person's license in the other state may apply for a Texas license or certification at that same level by completing and submitting to the board the application for licensure or certification or license by reciprocity and paying to the board the fee.

(b) The board shall seek verification from an applicant's state of current licensure that the applicant's license or certification is valid and in good standing. A reciprocal license or certificate may not be issued without the verification required by this subsection.

(c) Renewal of a certification or license granted through reciprocity shall be in the same manner, and with the same requirements, term, and fees, as for the same classification of certified or licensed appraiser as provided in §153.17 of this title (relating to Renewal or Extension of Certification and License or Renewal of Trainee Approval).

§153.33. Signature or Endorsement of Appraisal.

A certified or licensed appraiser who signs an appraisal report is responsible for the content of the entire appraisal report.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201006928
Devon V. Bijansky
General Counsel
Texas Appraiser Licensing and Certification Board
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For further information, please call: (512) 465-3938

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22 TAC §153.22, §153.31

The Texas Appraiser Licensing and Certification Board (TALCB) adopts the repeal of 22 TAC §153.22, License Holder's Responsibility to the Board, and §153.31, Office Location, without changes to the proposal as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8705). The repeal of these sections results from the Board's rule review process.

Section 153.22, License Holder's Responsibility to the Board, is repealed because its provisions are being incorporated into 22 TAC §153.20, Guidelines for Revocation, Suspension, or Denial of Licensure or Certification.

Section 153.31, Office Location, is repealed because its provisions are duplicative of Texas Occupations Code §1103.403, Office Location.

The reasoned justification for the repeal as adopted is greater clarity, consistency, and efficiency in TALCB's licensing processes.

No comments were received regarding the repeal as proposed.

The repeal is adopted under the Texas Occupations Code, §1103.151, Rules Relating to Certificates and Licenses.

The statute affected by this repeal is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the repeal of these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 214. VOCATIONAL NURSING EDUCATION

22 TAC §§214.2 - 214.9

INTRODUCTION.

The Texas Board of Nursing (Board) adopts amendments to §214.2 (relating to Definitions), §214.3 (relating to Program Development, Expansion, and Closure), §214.4 (relating to Approval), §214.5 (relating to Philosophy/Mission and Objectives/Outcomes), §214.6 (relating to Administration and Organization), §214.7 (relating to Faculty), §214.8 (relating to Students), and §214.9 (relating to Program of Study) without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9812) and will not be republished.

REASONED JUSTIFICATION.

These amendments are adopted under the Occupations Code §301.157 and §301.151 and are necessary to: (i) clarify definitions within the chapter; (ii) emphasize the importance of faculty supervised, hands-on patient care in clinical practice; (iii) clarify the Board's ability to change a nursing education program's level of approval status; (iv) specify minimum qualifications for vocational nursing education program administration and faculty; (v) correct typographical errors; and (vi) eliminate redundant and contradictory language within the chapter.

Definitions

The adopted amendments to §214.2 are necessary to clarify several of the existing definitions within the section and to add a new definition of "simulation" to the section. Recently, Board staff have received an increased number of inquiries from nursing educators across the state regarding the Board's requirements for clinical learning experiences in nursing education programs. Several of these inquiries related to the proper use of simulation in nursing education programs. In an effort to respond to these inquiries and to better address the role of simulation in clinical learning experiences, the Board has clarified the existing definition of "clinical learning experiences" in §214.2(10) and has added a new definition of "simulation" to the section.

First, the adopted definition of "clinical learning experiences" specifies several acceptable methods through which clinical learning experiences may occur. For example, under the adopted definition, a clinical learning experience may occur in an actual patient care clinical learning situation, an associated clinical conference, a nursing skills and computer laboratory, or a simulated clinical setting. The adopted definition also reiterates the importance of faculty supervised, hands-on patient care in clinical learning experiences and provides examples of several settings where such experiences may occur, including acute care facilities, extended care facilities, clients' residences, and community agencies. The addition of these examples is intended to better assist nursing educators and administrators in developing appropriate and meaningful clinical learning experiences for nursing students in this state.

The amendments also add a new definition of "simulation" to §214.2. Technological advances, shortages of available clinical sites, faculty shortages, national mandates for safety, and the complexity of today's health care environment have led more and more nursing education programs to consider utilizing simulation as a viable method of providing clinical learning experiences for students. The adopted definition of "simulation" in §214.2(39) is intended to clarify the role of simulation in clinical learning experiences so that nursing educators can develop and implement simulation programs that are educationally sound and meaningful.

The adopted amendments to §214.2(27) are necessary to more closely align the definition of "MEEP" with the manner in which nursing education programs utilize this exit option. The adopted amendments clarify that this exit option is a part of a professional nursing education program and provides an opportunity for nursing students to complete their coursework and apply to take the NCLEX-PN® after they have met all the requirements needed for the examination.

Finally, the adopted amendments to §214.2(19) are necessary to correctly reference the Differentiated Essential Competencies (DEC). The DEC prescribe expected educational outcomes that should be demonstrated by nursing students at the time of graduation. Formerly, these competencies were referred to as the Differentiated Entry Level Competencies (DELC). Recently, however, these competencies have been reviewed and revised. The adopted amendments to §214.2(19) correctly reference the updated name of these competencies and the most recent publication title and date of these competencies.

The remaining adopted amendments to §214.2 are necessary to correct typographical errors and to re-designate the remaining paragraphs of the section appropriately.

Approval Status

Existing §214.4 sets forth the procedures and requirements that apply to a nursing education program's approval status. In order for a new nursing education program in Texas to admit students, the nursing education program must be initially approved by the Board. Once the nursing education program has demonstrated compliance with all statutory and Board requirements and the licensing examination results from the first graduating class are evaluated by the Board, the Board may grant the nursing education program full approval status. Only a nursing education program with full approval status may initiate extension programs, grant faculty waivers, and petition for faculty waivers. A nursing education program's approval status is reviewed regularly by the Board to ensure the nursing education program's ongoing compliance with statutory and Board requirements. Some nursing education programs fail to maintain their compliance with statutory and Board requirements. When this occurs, the Board evaluates the nursing education program's deficiencies in order to determine the most appropriate corrective action. Depending upon the severity of a nursing education program's deficiencies,

it may be necessary for the Board to change or withdraw a nursing education program's level of approval status.

Currently, the Board issues five levels of nursing education program approval status: initial approval, full approval, full approval with warning, conditional approval, and withdrawal of approval. The Board's procedures and requirements applicable to each level of approval status are currently set forth in §214.4(a). The Board's procedures and requirements applicable to a change in a level of approval status are currently set forth in §214.4(c). Section 214.4(b) currently sets forth the factors that may be considered by the Board when evaluating a change in the level of a nursing education program's approval status. The adopted amendments do not substantively alter any of these procedures or requirements. Rather, the adopted amendments to §214.4 are intended to clarify the Board's existing procedures and requirements applicable to a change in the level of a nursing education program's approval status.

Specifically, adopted §214.4(c) re-iterates that the Board may change a nursing education program's level of approval status as necessary, depending upon the nursing education program's performance and demonstrated compliance with statutory and Board requirements. Further, the adopted amendments clarify that the Board is not required to change a nursing education program's level of approval status in any particular order. Existing §214.4(a) contains a progressive listing of the levels of approval status that may be issued to a nursing education program by the Board. Further, existing §214.4(c) describes certain circumstances under which a nursing education program's level of approval status may be evaluated by the Board. However, the particular organization of these provisions within §214.4 does not limit the Board's ability to change or withdraw a nursing education program's level of approval status as necessary. Rather, the Board will consider an individual nursing education program's specific deficiencies when determining whether to change or withdraw the nursing education program's level of approval status. In some cases, this may result in a nursing education program's level of approval status changing from one progressive level to another, such as full approval to full approval with warning. In other cases, however, this may result in a nursing education program's level of approval status changing from one level to another without consideration of the other levels of approval status, such as initial approval to conditional approval. In an effort to make clear that the Board is not required to change the level of a nursing education program's approval status in accordance with the progressive listing of approval status levels in §214.4(a) or (c), the adopted amendments to §214.4(c) re-organize portions of the existing text of the subsection and re-state that a change in a level of approval status is not implied or required by the description of the changes of levels of approval status in the subsection. The remaining adopted amendments are necessary to re-number the remaining paragraphs in subsection (c) appropriately.

Administration and Faculty

At its January, 2010, meeting, the Board charged the Advisory Committee on Education (Committee) with reviewing §214.6(f) and §214.7(c) and developing rule revisions as necessary. The Board's charge stemmed from the Board's review of several vocational nursing education programs in which the program's faculty and administration lacked the appropriate nursing education experience to successfully implement the program once it was approved by the Board. Although a faculty's nursing education experience is vital in creating and implementing a successful nursing educational program, the Board felt that its current rules did not clearly enough address the requisite level of experience that a nursing education program's faculty and administration must possess. As such, the Board charged the Committee with considering these concerns and recommending necessary changes, if any, to the Board's rules. The Committee convened on May 7, 2010, to consider the Board's charge. Following its discussions, the Committee voted to recommend amendments to the vocational nursing educational rules to clarify that: (i) a director or coordinator of a vocational nursing education program must have been actively employed in nursing for the past five years, preferably in administration or teaching, with a minimum of one year teaching experience in a pre-licensure nursing educational program; and (ii) each nurse faculty member must show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject area of his or her teaching responsibility. At its October, 2010, meeting, the Board considered the Committee's recommendations and voted to approve the amendments to §214.6(f) and §214.7(c).

The adopted amendments to §214.6(f) and §214.7(c) are necessary to implement the recommendations of the Committee and to establish minimum credentials that a nursing education program's administration and faculty must possess. Existing §214.6(f) requires each vocational nursing education program to be administered by a qualified individual who is accountable for the planning, implementation, and evaluation of the program. Further, existing §214.6(f) prescribes several specific credentials that a vocational nursing education program's director/coordinator must possess, including being actively employed in nursing for the past five year time period. The adopted amendments to §214.6(f)(2) build upon the existing rule requirements by requiring each director/coordinator to have at least one year teaching experience in a pre-licensure nursing education program. This adopted amendment is significant because it will ensure that the director/coordinator of a vocational nursing education program will have a minimal level of teaching experience in a pre-licensure nursing education program. Because such teaching experience is invaluable when planning, implementing, and developing a nursing education program, the adopted amendments are anticipated to result in the development of stronger and healthier vocational nursing education programs. The adopted amendments to §214.7(c) serve a similar purpose. Existing §214.7(c) prescribes the qualifications that each nurse faculty member must posses. The adopted amendments to §214.7(c) add an additional requirement that each nurse faculty member be required to show evidence of his or her teaching abilities and maintain current knowledge, clinical expertise, and safety in the subject area of his or her teaching responsibility. Because nurse faculty members are so instrumental in the success of a vocational nursing education program, it is of utmost importance that each nurse faculty member be able to carry out his or her teaching responsibilities competently. This includes a faculty member's ability to successfully convey nursing skills and concepts to students and to stay abreast of the most recent changes and trends in the faculty member's subject area so that the most current information is taught to students. In this way, the adopted amendments to §214.6(f) and §214.7(c) are intended to work together to ensure a sound and meaningful education experience for vocational nursing students in Texas.

Remaining Amendments

The adopted amendments to §214.5 and §214.9 are necessary to correctly reference the updated name of the Differentiated Es-

sential Competencies publication. The adopted amendments to §214.8 are necessary to eliminate redundant and contradictory language from §214.8(c) and to re-designate the remaining subsections of the section accordingly.

HOW THE SECTIONS WILL FUNCTION.

Adopted §214.2(10) defines "clinical learning experiences" as faculty planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the life span as appropriate to the role expectations of the graduates. Further, these experiences occur in actual patient care clinical learning situations and in associated clinical conferences; in nursing skills and computer laboratories; and in simulated clinical settings, including high-fidelity, where the activities involve using planned objectives in a realistic patient scenario guided by trained faculty and followed by a debriefing and evaluation of student performance. The clinical settings for faculty supervised, hands-on patient care include a variety of affiliating agencies or clinical practice settings, including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies.

Adopted §214.2(19) defines "Differentiated Essential Competencies (DEC)" as the expected educational outcomes to be demonstrated by nursing students at the time of graduation, as published in *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §214.2(27) defines "MEEP" as an exit option which is a part of a professional nursing educational program designed for students to complete coursework and apply to take the NCLEX-PN® examination after they have successfully met all requirements needed for the examination.

Adopted §214.2(39) defines "simulation" as activities that mimic the reality of a clinical environment and are designed to demonstrate procedures, decision-making, and critical thinking. A simulation may be very detailed and closely imitate reality, or it can be a grouping of components that are combined to provide some semblance of reality. Components of simulated clinical experiences include providing a scenario where the nursing student can engage in a realistic patient situation guided by trained faculty and followed by a debriefing and evaluation of student performance. Simulation provides a teaching strategy to prepare nursing students for safe, competent, hands-on practice, but it is not a substitute for faculty-supervised patient care.

Adopted §214.2(40) defines "staff" as employees of the Texas Board of Nursing.

Adopted §214.2(41) defines "supervision" as immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe first hand the practice of students.

Adopted §214.2(42) defines "survey visit" as an on-site visit to a vocational nursing educational program by a Board representative. The purpose of the visit is to evaluate the program of learning by gathering data to determine whether the program is meeting the Board's requirements as specified in §§214.1 - 214.13.

Adopted §214.2(43) defines "systematic approach" as the organized process in nursing that provides individualized, goal-directed nursing care by performing comprehensive nursing assessments regarding the health status of the client, making nursing diagnoses that serve as the basis for the strategy of care, developing a plan of care based on the assessment and nursing diagnosis, implementing nursing care, and evaluating the client's responses to nursing interventions.

Adopted §214.2(44) defines "Texas Higher Education Coordinating Board (THECB)" as a state agency created by the Legislature to provide coordination for the Texas higher education system, institutions, and governing boards, through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants (Texas Education Code, Title 3, Subtitle B, Chapter 61).

Adopted §214.2(45) defines "Texas Workforce Commission (TWC)" as the state agency charged with overseeing and providing workforce development services to employers and job seekers of Texas (Texas Labor Code, Title 4, Subtitle B, Chapter 301).

Adopted §214.2(46) defines "Vocational Nursing Educational Program" as an educational unit within the structure of a school, including a college, university, or proprietary school (career school or college); and a program conducted by a hospital that provides a program of study preparing graduates who are competent to practice safely and who are eligible to take the NCLEX-PN® examination.

Adopted §214.3(b)(2) states that instruction provided for the extension program/campus may include a variety of instructional methods, shall be congruent with the program's curriculum plan, and shall enable students to meet the goals, objectives, and competencies of the educational program and requirements of the Board as stated in §§214.1 - 214.13.

Adopted §214.4(a)(3) states that full or initial approval with warning is issued by the Board to a vocational nursing educational program that is not meeting legal and educational requirements.

Adopted §214.4(a)(4)(C) provides that, depending upon the degree to which the Board's legal and educational requirements are met, the Board may change the approval status from conditional approval to full approval or full approval with warning, or may withdraw approval.

Adopted §214.4(c)(2) provides that eighty percent (80%) of first-time candidates who complete the program of study are required to achieve a passing score on the NCLEX-PN® examination. When the passing score of first-time candidates who complete the vocational nursing educational program of study is less than 80% on the NCLEX-PN® examination during the examination year, the nursing program shall submit a self-study report that evaluates factors which contributed to the graduates' performance on the NCLEX-PN® examination and a description of the corrective measures to be implemented. The report shall follow Board guidelines.

Adopted §214.4(c)(3) states that the progressive designation of a change in approval status is not implied by the order of the listing in §214.4(c)(3). Further, a change in approval status is based upon each program's performance and demonstrated compliance to the Board's requirements and responses to the Board's recommendations. A change from one approval status to another may be determined by NCLEX-PN® examination pass rates, compliance audits, survey visits, and other factors listed under §214.4(b). Further, a warning may be issued to a program when: (i) the pass rate of first-time candidates, as

described in §214.4(c)(2)(A), is less than 80% for two consecutive examination years; (ii) the program has been in serious violation of the rules and regulations; or (iii) the program has engaged in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. Additionally, a program may be placed on conditional approval status if: (i) within one examination year from the date of the warning, the performance of first-time candidates on the NCLEX-PN® examination fails to be at least 80%; (ii) the faculty fails to implement appropriate corrective measures during the year; or (iii) the program has continued to engage in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. Approval may be withdrawn if: (i) the performance of first-time candidates fails to be at least 80% during the examination year following the date the program is placed on conditional approval; (ii) the program is consistently unable to meet requirements issued by the Board; or (iii) the program persists in engaging in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. A program issued a warning or placed on conditional approval status may request a review of the program's approval status by the Board at a regularly scheduled meeting if: (i) the program's pass rate for first-time candidates during one examination year is at least 80%; and (ii) the program has met all Board requirements.

Adopted §214.4(c)(4) states that each vocational nursing educational program shall be visited at least every six years after full approval has been granted, unless accredited by a Board-recognized national nursing accrediting agency.

Adopted §214.4(c)(5) states that the Texas Board of Nursing will select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have standards equivalent to the Board's ongoing approval standards. Identified areas that are not equivalent to the Board's ongoing approval standards will be monitored by the Board on an ongoing basis.

Adopted §214.4(c)(6) states that the Texas Board of Nursing will periodically review the standards of the national nursing accrediting agencies following revisions of accreditation standards or revisions in Board requirements for validation of continuing equivalency.

Adopted §214.4(c)(7) states that the Texas Board of Nursing will deny or withdraw approval from a school of nursing or educational program that fails to: (i) meet the prescribed course of study or other standard under which it sought approval by the Board; (ii) meet or maintain voluntary accreditation, by a school of nursing or educational program approved by the Board as stated in §214.4(c)(8), with the national nursing accrediting agency selected by the Board under which it was approved or sought approval by the Board; and (iii) maintain the approval of the state board of nursing of another state that the Board has determined has standards that are substantially equivalent to the Board's standards under which it was approved.

Adopted §214.4(c)(8) states that a school of nursing or educational program is considered approved by the Board and exempt from Board rules that require ongoing approval if the program: (i) is accredited and maintains voluntary accreditation through an approved national nursing accrediting agency that has been determined by the Board to have standards equivalent to the Board's ongoing approval standards; and (ii) maintains an acceptable pass rate, as determined by the Board, on the applicable licensing exam.

Adopted §214.4(c)(9) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate, as determined by the Board, on applicable licensing examinations is subject to review by the Board.

Adopted §214.4(c)(10) states that a school of nursing or educational program, approved by the Board as stated in §214.4(c)(8), that does not maintain voluntary accreditation through an approved national nursing accrediting agency that has been determined by the Board to have standards equivalent to the Board's ongoing approval standards is subject to review by the Board.

Adopted §214.4(c)(11) states that the Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Adopted §214.4(c)(12) states that a school or program from which approval has been withdrawn may reapply for approval.

Adopted §214.4(c)(13) states that a school of nursing or educational program accredited by an agency recognized by the Board shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board within three (3) months of receipt of official reports; (ii) notify the Board of any change in accreditation status within two (2) weeks following receipt of official notification letter; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Adopted §214.5(b) provides that program objectives/outcomes derived from the philosophy/mission shall reflect the *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §214.6(f) provides that the director/coordinator of each vocational nursing educational program shall have been actively employed in nursing for the past five years, preferably in administration or teaching, with a minimum of one year teaching experience in a pre-licensure nursing educational program.

Adopted §214.7(c)(2)(D) provides that each nurse faculty member shall show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in subject area of teaching responsibility.

Adopted §214.8(c) provides that the program shall have well-defined written nursing student policies based upon statutory and Board requirements, including nursing student admission, dismissal, progression, and graduation policies that shall be developed, implemented and enforced.

Adopted §214.8(d) states that reasons for dismissal shall be clearly stated in written nursing student policies and shall include any demonstration of the following, including, but not limited to: (i) evidence of actual or potential harm to patients, clients, or the public; (ii) criminal behavior whether violent or non-violent, directed against persons, property or public order and decency; (iii) intemperate use, abuse of drugs or alcohol, or diagnosis of or treatment for chemical dependency, mental illness, or diminished mental capacity; and (iv) the lack of good professional character as evidenced by a single incident or an integrated pattern of personal, academic and/or occupational behaviors which, in the judgment of the Board, indicates that an individual is unable to consistently conform his or her conduct to the requirements of the Nursing Practice Act, the Board's rules and regulations, and generally accepted standards of nursing practice

including, but not limited to, behaviors indicating honesty, accountability, trustworthiness, reliability, and integrity.

Adopted §214.8(e) states that policies shall facilitate mobility/articulation, be consistent with acceptable educational standards, and be available to students and faculty.

Adopted §214.8(f) provides that student policies shall be furnished manually or electronically to all students at the beginning of the students' enrollment in the nursing educational program.

Adopted §214.8(g) states that acceptance of transfer students and evaluation of allowable credit for advanced placement remains at the discretion of the director or coordinator of the program and the controlling agency/governing institution. Upon completing the receiving program's requirements, the individual is considered to be a graduate of the program.

Adopted §214.8(h) states that students shall have mechanisms for input into the development of academic policies and procedures, curriculum planning, and evaluation of teaching effectiveness.

Adopted §214.8(i) provides that students shall have the opportunity to evaluate faculty, courses, and learning resources and these evaluations shall be documented.

Adopted §214.9(a)(8) provides that the program of study shall include both didactic and clinical learning experiences and shall be designed and implemented to prepare students to demonstrate the *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §214.9(c) states that instruction shall include, but not be limited to, organized student/faculty interactive learning activities, formal lecture, audiovisual presentations, simulated laboratory instruction, and faculty-supervised, hands-on patient care clinical learning experiences.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

The Board did not receive any comments on the proposal.

STATUTORY AUTHORITY.

The amendments are adopted under the Occupations Code §301.157 and §301.151.

Section 301.157(a) provides that the Board shall prescribe three programs of study to prepare a person to receive an initial license as a registered nurse under Chapter 301 as follows: (i) a baccalaureate degree program that is conducted by an educational unit in nursing that is a part of a senior college or university and that leads to a baccalaureate degree in nursing; (ii) an associate degree program that is conducted by an educational unit in nursing within the structure of a college or a university and that leads to an associate degree in nursing; and (iii) a diploma program that is conducted by a single-purpose school, usually under the control of a hospital, and that leads to a diploma in nursing.

Section 301.157(a-1) states that a diploma program of study in this state that leads to an initial license as a registered nurse under this chapter and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education accredited by an agency recognized by the Texas Higher Education Coordinating Board.

Section 301.157(b) provides that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial vocational nurse license under Chapter 301 as follows: (A) a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school; and (B) a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or vocational nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or vocational nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that: (A) fails to meet the prescribed course of study or other standard under which it sought approval by the Board; (B) fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or (C) fails to maintain the approval of the state board of nursing of another state and the board under which it was approved.

Section 301.157(b-1) states that the Board may not require accreditation of the governing institution of a school of nursing. The Board shall accept the requirements established by the Texas Higher Education Coordinating Board for accrediting the governing institution of a school of nursing. The governing institution of a professional nursing school, not including a diploma program, must be accredited by an agency recognized by the Texas Higher Education Coordinating Board or hold a certificate of authority from the Texas Higher Education Coordinating Board under provisions leading to accreditation of the institution in due course.

Section 301.157(c) states that a program approved to prepare registered nurses may not be less than two academic years or more than four calendar years.

Section 301.157(d) states that a person may not be certified as a graduate of any school of nursing or educational program unless the person has completed the requirements of the prescribed course of study, including clinical practice, of a school of nursing or educational program that: (i) is approved by the Board; (ii) is accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or (iii) is approved by a state board of nursing of another state and the board, subject to §301.157(d-4).

Section 301.157(d-1) states that a school of nursing or educational program is considered approved by the Board and, except as provided by §301.157(d-7), is exempt from Board rules that require ongoing approval if the school or program: (i) is accredited and maintains accreditation through a national nursing accrediting agency selected by the Board under §301.157(b)(5); and (ii) maintains an acceptable pass rate as determined by the Board on the applicable licensing examination under Chapter 301.

Section 301.157(d-2) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate on applicable licensing examinations under Chapter 301 is subject to review by the Board. The Board may assist the school

or program in its effort to achieve compliance with the Board's standards.

Section 301.157(d-3) states that a school or program from which approval has been withdrawn under §301.157 may reapply for approval.

Section 301.157(d-4) states that the Board may recognize and accept as approved under §301.157 a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state. The Board shall develop policies to ensure that the other state's standards are substantially equivalent to the Board's standards.

Section 301.157(d-5) states that the Board shall streamline the process for initially approving a school of nursing or educational program under §301.157 by identifying and eliminating tasks performed by the Board that duplicate or overlap tasks performed by the Texas Higher Education Coordinating Board or the Texas Workforce Commission.

Section 301.157(d-6) states that the Board, in cooperation with the Texas Higher Education Coordinating Board and the Texas Workforce Commission, shall establish guidelines for the initial approval of schools of nursing or educational programs. The guidelines must: (i) identify the approval processes to be conducted by the Texas Higher Education Coordinating Board or the Texas Workforce Commission; (ii) require the approval process identified under §301.157(d-1) to precede the approval process conducted by the Board; and (iii) be made available on the Board's Internet website and in a written form.

Section 301.157(d-7) states that a school of nursing or educational program approved under §301.157(d-1) shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board; (ii) notify the Board of any change in accreditation status; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Section 301.157(d-8) states that, for purposes of §301.157(d-4), a nursing program is considered to meet standards substantially equivalent to the Board's standards if the program: (i) is part of an institution of higher education located outside this state that is approved by the appropriate regulatory authorities of that state; (ii) holds regional accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation; (iii) holds specialty accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation, including the National League for Nursing Accrediting Commission; (iv) requires program applicants to be a licensed practical or vocational nurse, a military service corpsman, or a paramedic, or to hold a college degree in a clinically oriented health care field with demonstrated experience providing direct patient care; and (v) graduates students who achieve faculty-determined program outcomes, including passing criterion-referenced examinations of nursing knowledge essential to beginning a registered nursing practice and transitioning to the role of registered nurse; pass a criterion-referenced summative performance examination developed by faculty subject matter experts that measures clinical competencies essential to beginning a registered nursing practice and that meets nationally recognized standards for educational testing, including the educational testing standards of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education; and pass the National Council Licensure Examination for Registered Nurses at a rate equivalent to the passage rate for students of approved in-state programs.

Section 301.157(d-9) states that a graduate of a clinical competency assessment program operated in another state and approved by a state board of nursing or other regulatory body of another state is eligible to apply for an initial license under Chapter 301 if: (i) the Board allowed graduates of the program to apply for an initial license under Chapter 301 continuously during the 10-year period preceding January 1, 2007; (ii) the program does not make any substantial changes in the length or content of its clinical competency assessment without the Board's approval; (iii) the program remains in good standing with the state board of nursing or other regulatory body in the other state; and (iv) the program participates in the research study under §105.008, Health and Safety Code.

Section 301.157(d-10) states that, in §301.157, the terms "clinical competency assessment program" and "supervised clinical learning experiences program" have the meanings assigned by the Health and Safety Code §105.008.

Section 301.157(d-11) states that §301.157(d-8), (d-9), (d-10), and (d-11) expire December 31, 2017. As part of the first review conducted under §301.003 after September 1, 2009, the Sunset Advisory Commission shall: (i) recommend whether §301.157(d-8) and (d-9) should be extended; and (ii) recommend any changes to §301.157(d-8) and (d-9) relating to the eligibility for a license of graduates of a clinical competency assessment program operated in another state.

Section 301.157(e) states that the Board shall give each person, including an organization, affected by an order or decision of the Board under §301.157 reasonable notice of not less than 20 days and an opportunity to appear and be heard regarding the order or decision. The Board shall hear each protest or complaint from a person affected by a rule or decision regarding: (i) the inadequacy or unreasonableness of any rule or order the Board adopts; or (ii) the injustice of any order or decision of the Board.

Section 301.157(f) states that not later than the 30th day after the date an order is entered and approved by the Board, a person is entitled to bring an action against the Board in a district court of Travis County to have the rule or order vacated or modified, if that person: (i) is affected by the order or decision; (ii) is dissatisfied with any rule or order of the Board; and (iii) sets forth in a petition the principal grounds of objection to the rule or order.

Section 301.157(g) states that an appeal under this section shall be tried de novo as if it were an appeal from a justice court to a county court.

Section 301.157(h) states that the Board, in collaboration with the nursing educators, the Texas Higher Education Coordinating Board, and the Texas Health Care Policy Council, shall implement, monitor, and evaluate a plan for the creation of innovative nursing education models that promote increased enrollment in this state's nursing programs.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006932
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Effective date: December 27, 2010
Proposal publication date: November 5, 2010
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CHAPTER 215. PROFESSIONAL NURSING EDUCATION

22 TAC §§215.2 - 215.5, 215.8, 215.9

INTRODUCTION.

The Texas Board of Nursing (Board) adopts amendments to §215.2 (relating to Definitions); §215.3 (relating to Program Development, Expansion, and Closure), §215.4 (relating to Approval), §215.5 (relating to Philosophy/Mission and Objectives/Outcomes), §215.8 (relating to Students), and §215.9 (relating to Program of Study) without changes to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9822) and will not be republished.

REASONED JUSTIFICATION.

These amendments are adopted under the Occupations Code §301.157 and §301.151 and are necessary to: (i) clarify definitions within the chapter; (ii) emphasize the importance of faculty supervised, hands-on patient care in clinical practice; (iii) clarify the Board's ability to change a nursing education program's level of approval status; (iv) correct typographical errors; and (v) eliminate redundant and contradictory language within the chapter.

Definitions.

The adopted amendments to §215.2 are necessary to clarify several of the existing definitions within the section and to add a new definition of "simulation" to the section. Recently, Board staff have received an increased number of inquiries from nursing educators across the state regarding the Board's requirements for clinical learning experiences in nursing education programs. Several of these inquiries related to the proper use of simulation in nursing education programs. In an effort to respond to these inquiries and to better address the role of simulation in clinical learning experiences, the Board has clarified the existing definition of "clinical learning experiences" in §215.2(9) and has added a new definition of "simulation" to the section.

First, the adopted definition of "clinical learning experiences" specifies several acceptable methods through which clinical learning experiences may occur. For example, under the adopted definition, a clinical learning experience may occur in an actual patient care clinical learning situation, an associated clinical conference, a nursing skills and computer laboratory, or a simulated clinical setting. The adopted definition also re-iterates the importance of faculty supervised, hands-on patient care in clinical learning experiences and provides examples of several settings where such experiences may occur, including acute care facilities, extended care facilities, clients' residences, and community agencies. The addition of these examples is intended to better assist nursing educators and administrators in developing appropriate and meaningful clinical learning experiences for nursing students in this state.

The amendments also add a new definition of "simulation" to §215.2. Technological advances, shortages of available clinical sites, faculty shortages, national mandates for safety, and the complexity of today's health care environment have led more and more nursing education programs to consider utilizing simulation as a viable method of providing clinical learning experiences for students. The adopted definition of "simulation" in §215.2(38) is intended to clarify the role of simulation in clinical learning experiences so that nursing educators can develop and implement simulation programs that are educationally sound and meaningful.

The adopted amendments to §215.2(26) are necessary to more closely align the definition of "MEEP" with the manner in which nursing education programs utilize this exit option. The adopted amendments clarify that this exit option is a part of a professional nursing education program and provides an opportunity for nursing students to complete their coursework and apply to take the NCLEX-PN® after they have met all the requirements needed for the examination.

Finally, the adopted amendments to §215.2(19) are necessary to correctly reference the Differentiated Essential Competencies (DEC). The Differentiated Essential Competencies (DEC) prescribe expected educational outcomes that should be demonstrated by nursing students at the time of graduation. Formerly, these competencies were referred to as the Differentiated Entry Level Competencies (DELC). Recently, however, these competencies have been reviewed and revised. The adopted amendments to §215.2(19) correctly reference the updated name of these competencies and the most recent publication title and date of these competencies.

The remaining adopted amendments to §215.2 are necessary to correct typographical errors and to re-designate the remaining paragraphs of the section appropriately.

Approval Status

Existing §215.4 sets forth the procedures and requirements that apply to a nursing education program's approval status. In order for a new nursing education program in Texas to admit students, the nursing education program must be initially approved by the Board. Once the nursing education program has demonstrated compliance with all statutory and Board requirements and the licensing examination results from the first graduating class are evaluated by the Board, the Board may grant the nursing education program full approval status. Only a nursing education program with full approval status may initiate extension programs, grant faculty waivers, and petition for faculty waivers. A nursing education program's approval status is reviewed regularly by the Board to ensure the nursing education program's ongoing compliance with statutory and Board requirements. Some nursing education programs fail to maintain their compliance with statutory and Board requirements. When this occurs, the Board evaluates the nursing education program's deficiencies in order to determine the most appropriate corrective action. Depending upon the severity of a nursing education program's deficiencies, it may be necessary for the Board to change or withdraw a nursing education program's level of approval status.

Currently, the Board issues five levels of nursing education program approval status: initial approval, full approval, full approval with warning, conditional approval, and withdrawal of approval. The Board's procedures and requirements applicable to each level of approval status are currently set forth in §215.4(a). The Board's procedures and requirements applicable to a change in a level of approval status are currently set forth in §215.4(c). Section 215.4(b) currently sets forth the factors that may be considered by the Board when evaluating a change in the level of a nursing education program's approval status. The amendments do not substantively alter any of these procedures or requirements. Rather, the adopted amendments to §215.4 are intended to clarify the Board's existing procedures and requirements applicable to a change in the level of a nursing education program's approval status.

Specifically, adopted §215.4(c) re-iterates that the Board may change a nursing education program's level of approval status as necessary, depending upon the nursing education program's performance and demonstrated compliance with statutory and Board requirements. Further, the adopted amendments clarify that the Board is not required to change a nursing education program's level of approval status in any particular order. Existing §215.4(a) contains a progressive listing of the levels of approval status that may be issued to a nursing education program by the Board. Further, existing §215.4(c) describes certain circumstances under which a nursing education program's level of approval status may be evaluated by the Board. However, the particular organization of these provisions within §215.4 does not limit the Board's ability to change or withdraw a nursing education program's level of approval status as necessary. Rather, the Board will consider an individual nursing education program's specific deficiencies when determining whether to change or withdraw the nursing education program's level of approval status. In some cases, this may result in a nursing education program's level of approval status changing from one progressive level to another, such as full approval to full approval with warning. In other cases, however, this may result in a nursing education program's level of approval status changing from one level to another without consideration of the other levels of approval status, such as initial approval to conditional approval. In an effort to make clear that the Board is not required to change the level of a nursing education program's approval status in accordance with the progressive listing of approval status levels in §215.4(a) or (c), the adopted amendments to §215.4(c) re-organize portions of the existing text of the subsection and re-state that a change in a level of approval status is not implied or required by the description of the changes of levels of approval status in the subsection. The remaining adopted amendments are necessary to re-number the remaining paragraphs in subsection (c) appropriately.

Remaining Amendments

The adopted amendments to §215.5 and §215.9 are necessary to correctly reference the updated name of the Differentiated Essential Competencies publication. The adopted amendments to §215.8 are necessary to eliminate redundant and contradictory language from §215.8(c) and re-designate the remaining subsections of the section accordingly.

HOW THE SECTIONS WILL FUNCTION.

Adopted §215.2(9) defines "clinical learning experiences" as faculty planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the life span as appropriate to the role expectations of the graduates. Further, these experiences occur in actual patient care clinical learning situations and in associated clinical conferences; in nursing skills and computer laboratories; and in simulated clinical settings, including high-fidelity, where the activities involve using planned objectives in a realistic patient scenario guided by trained faculty and followed by a debriefing and evaluation of student performance. The clinical settings for faculty supervised, hands-on patient care include a variety of affiliating agencies or clinical practice settings, including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies.

Adopted §215.2(19) defines "Differentiated Essential Competencies (DEC)" as the expected educational outcomes to be demonstrated by nursing students at the time of graduation, as published in *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §215.2(26) defines "MEEP" as an exit option which is a part of a professional nursing educational program designed for students to complete coursework and apply to take the NCLEX-PN® examination after they have successfully met all requirements needed for the examination.

Adopted §215.2(38) defines "simulation" as activities that mimic the reality of a clinical environment and are designed to demonstrate procedures, decision-making, and critical thinking. A simulation may be very detailed and closely imitate reality, or it can be a grouping of components that are combined to provide some semblance of reality. Components of simulated clinical experiences include providing a scenario where the nursing student can engage in a realistic patient situation guided by trained faculty and followed by a debriefing and evaluation of student performance. Simulation provides a teaching strategy to prepare nursing students for safe, competent, hands-on practice, but it is not a substitute for faculty-supervised patient care.

Adopted §215.2(39) defines "staff" as employees of the Texas Board of Nursing.

Adopted §215.2(40) defines "supervision" as immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe first hand the practice of students.

Adopted §215.2(41) defines "survey visit" as an on-site visit to a professional nursing educational program by a Board representative. The purpose of the visit is to evaluate the program of learning by gathering data to determine whether the program is meeting the Board's requirements as specified in §§215.1 - 215.13.

Adopted §215.2(42) defines "systematic approach" as the organized process in nursing that provides individualized, goal-directed nursing care by performing comprehensive nursing assessments regarding the health status of the client, making nursing diagnoses that serve as the basis for the strategy of care, developing a plan of care based on the assessment and nursing diagnosis, implementing nursing care, and evaluating the client's responses to nursing interventions.

Adopted §215.2(43) defines "Texas Higher Education Coordinating Board (THECB)" as a state agency created by the Legislature to provide coordination for the Texas higher education sys-

tem, institutions, and governing boards, through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants (Texas Education Code, Title 3, Subtitle B, Chapter 61).

Adopted §215.2(44) defines "Texas Workforce Commission (TWC)" as the state agency charged with overseeing and providing workforce development services to employers and job seekers of Texas (Texas Labor Code, Title 4, Subtitle B, Chapter 301).

Adopted §215.3(b)(2) states that instruction provided for the extension program/campus may include a variety of instructional methods, shall be congruent with the program's curriculum plan, and shall enable students to meet the goals, objectives, and competencies of the educational program and requirements of the Board as stated in §§215.1 - 215.13.

Adopted §215.4(a)(3) states that full or initial approval with warning is issued by the Board to a professional nursing educational program that is not meeting legal and educational requirements.

Adopted §215.4(a)(4)(C) provides that, depending upon the degree to which the Board's legal and educational requirements are met, the Board may change the approval status from conditional approval to full approval or full approval with warning, or may withdraw approval.

Adopted §215.4(c)(2) provides that eighty percent (80%) of first-time candidates who complete the program of study are required to achieve a passing score on the NCLEX-RN® examination. When the passing score of first-time candidates who complete the professional nursing educational program of study is less than 80% on the NCLEX-RN® examination during the examination year, the nursing program shall submit a self-study report that evaluates factors which contributed to the graduates' performance on the NCLEX-RN® examination and a description of the corrective measures to be implemented. The report shall follow Board guidelines.

Adopted §215.4(c)(3) states that the progressive designation of a change in approval status is not implied by the order of the listing in §215.4(c)(3). Further, a change in approval status is based upon each program's performance and demonstrated compliance to the Board's requirements and responses to the Board's recommendations. A change from one approval status to another may be determined by NCLEX-RN® examination pass rates, compliance audits, survey visits, and other factors listed under §215.4(b). Further, a warning may be issued to a program when: (i) the pass rate of first-time candidates, as described in §215.4(c)(2)(A), is less than 80% for two consecutive examination years; (ii) the program has been in serious violation of the rules and regulations; or (iii) the program has engaged in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. Additionally, a program may be placed on conditional approval status if: (i) within one examination year from the date of the warning, the performance of first-time candidates on the NCLEX-RN® examination fails to be at least 80%; (ii) the faculty fails to implement appropriate corrective measures during the year; or (iii) the program has continued to engage in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. Approval may be withdrawn if: (i) the performance of first-time candidates fails to be at least 80% during the examination year following the date the program is placed on conditional approval; (ii) the program is consistently unable to meet requirements issued by the Board; or (iii) the program persists in engaging in activities or situations that demonstrate to the Board that the program is not meeting legal requirements and standards. A program issued a warning or placed on conditional approval status may request a review of the program's approval status by the Board at a regularly scheduled meeting if: (i) the program's pass rate for first-time candidates during one examination year is at least 80%; and (ii) the program has met all Board requirements.

Adopted §215.4(c)(4) states that each professional nursing educational program shall be visited at least every six years after full approval has been granted, unless accredited by a Board-recognized national nursing accrediting agency.

Adopted §215.4(c)(5) states that the Texas Board of Nursing will select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have standards equivalent to the Board's ongoing approval standards. Identified areas that are not equivalent to the Board's ongoing approval standards will be monitored by the Board on an ongoing basis.

Adopted §215.4(c)(6) states that the Texas Board of Nursing will periodically review the standards of the national nursing accrediting agencies following revisions of accreditation standards or revisions in Board requirements for validation of continuing equivalency.

Adopted §215.4(c)(7) states that the Texas Board of Nursing will deny or withdraw approval from a school of nursing or educational program that fails to: (i) meet the prescribed course of study or other standard under which it sought approval by the Board; (ii) meet or maintain voluntary accreditation, by a school of nursing or educational program approved by the Board as stated in §215.4(c)(8), with the national nursing accrediting agency selected by the Board under which it was approved or sought approval by the Board; and (iii) maintain the approval of the state board of nursing of another state that the Board has determined has standards that are substantially equivalent to the Board's standards under which it was approved.

Adopted §215.4(c)(8) states that a school of nursing or educational program is considered approved by the Board and exempt from Board rules that require ongoing approval if the program: (i) is accredited and maintains voluntary accreditation through an approved national nursing accrediting agency that has been determined by the Board to have standards equivalent to the Board's ongoing approval standards; and (ii) maintains an acceptable pass rate, as determined by the Board, on the applicable licensing exam.

Adopted §215.4(c)(9) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate, as determined by the Board, on applicable licensing examinations is subject to review by the Board.

Adopted §215.4(c)(10) states that a school of nursing or educational program, approved by the Board as stated in §215.4(c)(8), that does not maintain voluntary accreditation through an approved national nursing accrediting agency that has been determined by the Board to have standards equivalent to the Board's ongoing approval standards is subject to review by the Board.

Adopted §215.4(c)(11) states that the Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Adopted §215.4(c)(12) states that a school or program from which approval has been withdrawn may reapply for approval.

Adopted §215.4(c)(13) states that a school of nursing or educational program accredited by an agency recognized by the Board shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board within three (3) months of receipt of official reports; (ii) notify the Board of any change in accreditation status within two (2) weeks following receipt of official notification letter; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Adopted §215.5(b) provides that program objectives/outcomes derived from the philosophy/mission shall reflect the *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §215.8(c) provides that the program shall have well-defined written nursing student policies based upon statutory and Board requirements, including nursing student admission, dismissal, progression, and graduation policies that shall be developed, implemented and enforced.

Adopted §215.8(d) states that reasons for dismissal shall be clearly stated in written nursing student policies and shall include any demonstration of the following, including, but not limited to: (i) evidence of actual or potential harm to patients, clients, or the public; (ii) criminal behavior whether violent or non-violent, directed against persons, property or public order and decency; (iii) intemperate use, abuse of drugs or alcohol, or diagnosis of or treatment for chemical dependency, mental illness, or diminished mental capacity; and (iv) the lack of good professional character as evidenced by a single incident or an integrated pattern of personal, academic and/or occupational behaviors which, in the judgment of the Board, indicates that an individual is unable to consistently conform his or her conduct to the requirements of the Nursing Practice Act, the Board's rules and regulations, and generally accepted standards of nursing practice including, but not limited to, behaviors indicating honesty, accountability, trustworthiness, reliability, and integrity.

Adopted §215.8(e) states that policies shall facilitate mobility/articulation, be consistent with acceptable educational standards, and be available to students and faculty.

Adopted §215.8(f) provides that student policies shall be furnished manually or electronically to all students at the beginning of the students' enrollment in the nursing educational program.

Adopted §215.8(g) states that acceptance of transfer students and evaluation of allowable credit for advanced placement remains at the discretion of the director or coordinator of the program and the controlling agency/governing institution. Upon completing the receiving program's requirements, the individual is considered to be a graduate of the program.

Adopted §215.8(h) states that students shall have mechanisms for input into the development of academic policies and procedures, curriculum planning, and evaluation of teaching effectiveness.

Adopted §215.8(i) provides that students shall have the opportunity to evaluate faculty, courses, and learning resources and these evaluations shall be documented.

Adopted §215.9(a)(7) provides that the program of study shall include both didactic and clinical learning experiences and shall be designed and implemented to prepare students to demonstrate the *Differentiated Essential Competencies of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgment, and Behaviors: Vocational (VN), Diploma/Associate Degree (DIP/AND), Baccalaureate Degree (BSN), October 2010* (DEC).

Adopted §215.9(c) states that instruction shall include, but not be limited to, organized student/faculty interactive learning activities, formal lecture, audiovisual presentations, simulated laboratory instruction, and faculty-supervised, hands-on patient care clinical learning experiences.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

The Board did not receive any comments on the proposal.

STATUTORY AUTHORITY.

The amendments are adopted under the Occupations Code §301.157 and §301.151.

Section 301.157(a) provides that the Board shall prescribe three programs of study to prepare a person to receive an initial license as a registered nurse under Chapter 301 as follows: (i) a baccalaureate degree program that is conducted by an educational unit in nursing that is a part of a senior college or university and that leads to a baccalaureate degree in nursing; (ii) an associate degree program that is conducted by an educational unit in nursing within the structure of a college or a university and that leads to an associate degree in nursing; and (iii) a diploma program that is conducted by a single-purpose school, usually under the control of a hospital, and that leads to a diploma in nursing.

Section 301.157(a-1) states that a diploma program of study in this state that leads to an initial license as a registered nurse under this chapter and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education accredited by an agency recognized by the Texas Higher Education Coordinating Board.

Section 301.157(b) provides that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial vocational nurse license under Chapter 301 as follows: (A) a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school; and (B) a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or vocational nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or vocational nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that: (A) fails to meet the prescribed course of study or other standard under which it sought approval by the Board; (B) fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or (C) fails to

maintain the approval of the state board of nursing of another state and the board under which it was approved.

Section 301.157(b-1) states that the Board may not require accreditation of the governing institution of a school of nursing. The Board shall accept the requirements established by the Texas Higher Education Coordinating Board for accrediting the governing institution of a school of nursing. The governing institution of a professional nursing school, not including a diploma program, must be accredited by an agency recognized by the Texas Higher Education Coordinating Board or hold a certificate of authority from the Texas Higher Education Coordinating Board under provisions leading to accreditation of the institution in due course.

Section 301.157(c) states that a program approved to prepare registered nurses may not be less than two academic years or more than four calendar years.

Section 301.157(d) states that a person may not be certified as a graduate of any school of nursing or educational program unless the person has completed the requirements of the prescribed course of study, including clinical practice, of a school of nursing or educational program that: (i) is approved by the Board; (ii) is accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or (iii) is approved by a state board of nursing of another state and the board, subject to §301.157(d-4).

Section 301.157(d-1) states that a school of nursing or educational program is considered approved by the Board and, except as provided by §301.157(d-7), is exempt from Board rules that require ongoing approval if the school or program: (i) is accredited and maintains accreditation through a national nursing accrediting agency selected by the Board under §301.157(b)(5); and (ii) maintains an acceptable pass rate as determined by the Board on the applicable licensing examination under Chapter 301.

Section 301.157(d-2) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate on applicable licensing examinations under Chapter 301 is subject to review by the Board. The Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Section 301.157(d-3) states that a school or program from which approval has been withdrawn under §301.157 may reapply for approval.

Section 301.157(d-4) states that the Board may recognize and accept as approved under §301.157 a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state. The Board shall develop policies to ensure that the other state's standards are substantially equivalent to the Board's standards.

Section 301.157(d-5) states that the Board shall streamline the process for initially approving a school of nursing or educational program under §301.157 by identifying and eliminating tasks performed by the Board that duplicate or overlap tasks performed by the Texas Higher Education Coordinating Board or the Texas Workforce Commission.

Section 301.157(d-6) states that the Board, in cooperation with the Texas Higher Education Coordinating Board and the Texas Workforce Commission, shall establish guidelines for the initial approval of schools of nursing or educational programs. The guidelines must: (i) identify the approval processes to be conducted by the Texas Higher Education Coordinating Board or the Texas Workforce Commission; (ii) require the approval process identified under §301.157(d-1) to precede the approval process conducted by the Board; and (iii) be made available on the Board's Internet website and in a written form.

Section 301.157(d-7) states that a school of nursing or educational program approved under §301.157(d-1) shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board; (ii) notify the Board of any change in accreditation status; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Section 301.157(d-8) states that, for purposes of §301.157(d-4), a nursing program is considered to meet standards substantially equivalent to the Board's standards if the program: (i) is part of an institution of higher education located outside this state that is approved by the appropriate regulatory authorities of that state; (ii) holds regional accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation; (iii) holds specialty accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation, including the National League for Nursing Accrediting Commission; (iv) requires program applicants to be a licensed practical or vocational nurse, a military service corpsman, or a paramedic, or to hold a college degree in a clinically oriented health care field with demonstrated experience providing direct patient care; and (v) graduates students who achieve faculty-determined program outcomes, including passing criterion-referenced examinations of nursing knowledge essential to beginning a registered nursing practice and transitioning to the role of registered nurse; pass a criterion-referenced summative performance examination developed by faculty subject matter experts that measures clinical competencies essential to beginning a registered nursing practice and that meets nationally recognized standards for educational testing, including the educational testing standards of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education; and pass the National Council Licensure Examination for Registered Nurses at a rate equivalent to the passage rate for students of approved in-state programs.

Section 301.157(d-9) states that a graduate of a clinical competency assessment program operated in another state and approved by a state board of nursing or other regulatory body of another state is eligible to apply for an initial license under Chapter 301 if: (i) the Board allowed graduates of the program to apply for an initial license under Chapter 301 continuously during the 10-year period preceding January 1, 2007; (ii) the program does not make any substantial changes in the length or content of its clinical competency assessment without the Board's approval; (iii) the program remains in good standing with the state board of nursing or other regulatory body in the other state; and (iv) the program participates in the research study under §105.008, Health and Safety Code.

Section 301.157(d-10) states that, in §301.157, the terms "clinical competency assessment program" and "supervised clinical learning experiences program" have the meanings assigned by the Health and Safety Code §105.008.

Section 301.157(d-11) states that §301.157(d-8), (d-9), (d-10), and (d-11) expire December 31, 2017. As part of the first

review conducted under §301.003 after September 1, 2009, the Sunset Advisory Commission shall: (i) recommend whether §301.157(d-8) and (d-9) should be extended; and (ii) recommend any changes to §301.157(d-8) and (d-9) relating to the eligibility for a license of graduates of a clinical competency assessment program operated in another state.

Section 301.157(e) states that the Board shall give each person, including an organization, affected by an order or decision of the Board under §301.157 reasonable notice of not less than 20 days and an opportunity to appear and be heard regarding the order or decision. The Board shall hear each protest or complaint from a person affected by a rule or decision regarding: (i) the inadequacy or unreasonableness of any rule or order the Board adopts; or (ii) the injustice of any order or decision of the Board.

Section 301.157(f) states that not later than the 30th day after the date an order is entered and approved by the Board, a person is entitled to bring an action against the Board in a district court of Travis County to have the rule or order vacated or modified, if that person: (i) is affected by the order or decision; (ii) is dissatisfied with any rule or order of the Board; and (iii) sets forth in a petition the principal grounds of objection to the rule or order.

Section 301.157(g) states that an appeal under this section shall be tried de novo as if it were an appeal from a justice court to a county court.

Section 301.157(h) states that the Board, in collaboration with the nursing educators, the Texas Higher Education Coordinating Board, and the Texas Health Care Policy Council, shall implement, monitor, and evaluate a plan for the creation of innovative nursing education models that promote increased enrollment in this state's nursing programs.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

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Texas Board of Nursing
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For further information, please call: (512) 305-6822

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS RELATING TO THE REQUIREMENTS OF LICENSURE

22 TAC §535.1

The Texas Real Estate Commission (TREC or the commission) adopts the repeal of §535.1, regarding License Required, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8248) and will not be republished.

The subchapter is renamed from "General Provisions Relating to the Requirements of Licensure" to "Definitions". The rule is repealed because the subjects addressed are covered in new amendments to Subchapter B which TREC is simultaneously adopting as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters comprehensively addresses the subjects of the repealed rule, repeal of the rule is necessary to avoid confusion and repetition.

The reasoned justification for the repeal of the rules is to avoid confusion and make all the rules more streamlined and readable.

No comments were received on the rule as proposed.

The repeal is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER A. DEFINITIONS

22 TAC §535.1

The Texas Real Estate Commission (TREC or the commission) adopts new §535.1, regarding Definitions, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8248) and will not be republished.

The subchapter name is renamed from "General Provisions Relating to the Requirements of Licensure" to "Definitions". The new subchapter name and new rule are adopted as part of a

comprehensive rule review of 22 TAC Chapter 535. New §535.1 provides definitions for commonly used terms and phrases in Chapter 535. Generally speaking, the new rule corrects typographical errors, reorganizes, clarifies, and streamlines existing rules, and updates cites to new laws and codes.

The reasoned justification for the amendments to the rules is to make them more streamlined and readable.

No comments were received on the rule as proposed.

The new rule is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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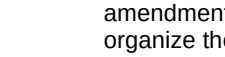

SUBCHAPTER B. GENERAL PROVISIONS RELATING TO THE REQUIREMENTS OF LICENSURE

22 TAC §§535.2 - 535.5, 535.16, 535.17, 535.20

The Texas Real Estate Commission (TREC) adopts amendments to §535.2, regarding Broker Responsibility; §535.3, regarding Compensation to or Paid by a Salesperson; §535.16, regarding Listings; Net Listings; §535.17, regarding Appraisals; and §535.20, regarding Referrals from Unlicensed Persons; new §535.4, regarding License Required; and new §535.5, regarding License Not Required. Section 535.2 is adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8249) and will be republished. Sections 535.3 - 535.5, 535.16, 535.17, and 535.20 are adopted without changes and will not be republished.

The differences between the rule as proposed and the rule as finally adopted are as follows: §535.2(g) changes the reference "of this chapter" to "of this title (relating to Advertising)" and in §535.2(i)(8) a typographical error was corrected to reference "subsection (h)" instead of "subsection (f)."

TREC renames the subchapter name from "Definitions" to "General Provisions Relating to the Requirements of Licensure".

The amendments to §535.2 articulate a broker's responsibilities to their sponsored salespersons, the public, and other brokers. Under the rule, a broker is required to advise a sponsored salesperson of the scope of the salespersons authorized activities under the act and clarifies the liability of the broker for the activities of the salesperson if the broker permits a salesperson to engage in activities beyond the scope originally authorized. The amendments clarify that a broker is responsible for any property management activity conducted by their sponsored salespersons and for advertising of sponsored salespersons. The amendments permit a broker to designate in writing another licensee to be responsible for day-to-day supervision of sponsored salespersons; however, the broker would continue to have overall responsibility of the salespersons. The amendments require a broker to maintain records of transactions for a period of 4 years; maintain written policies and procedures addressing specified activities; and promptly deliver commission correspondence to sponsored salespersons. The amendments clarify that the broker responsibility rules are not meant to create an employer/employee relationship where there is none.

The amendments to §535.3 regarding Compensation to or Paid by a Salesperson require that an agreement between a broker and sponsored salesperson regarding the compensation a salesperson receives or pays to other licensees must be in writing. New §535.4 regarding License Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is required under the Act, as well as a new provision which clarifies that a corporation or limited liability company owned by a broker or salesperson which receives compensation on behalf of the licensee must be licensed as a broker under the Act. New §535.5 regarding License Not Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is not required under the Act. The amendments to §535.16 change the name of the section and reorganize the subsections. The amendments to §535.17 reorganize the subsections. The amendment to §535.20 changes the name of the rule from "Procuring Prospects" to "Referrals from Unlicensed Persons."

Generally speaking, the amendments and new rules correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules, and clarification regarding a broker's responsibility to consumers and sponsored salespersons.

The Texas Association of Realtors, the Texas Apartment Association and the Metrotex Association of Realtors commented on several rules proposed under Subchapter B. The commission received a total of four comments on the rules as proposed.

Comment: One person commented favorably on 22 TAC §535.2 and §535.4 as proposed.

Comment: One person commented favorably on §535.4 and §535.5 as proposed.

Comment: One person commented favorably on proposed §535.4.

Comment: One commenter expressed concerns about whether an agent may assign their commission to a third party once the agent receives the commission.

Response: The rule does not prohibit an agent from assigning any fees the agent earns to a third party, such as a principal to a transaction or a company who advances loans to agents, as long as the agent is not paying the third party for brokerage services provided by the third party. Also, according to the new rule, a company created for the express purpose of collecting fees for the agent would be required to have a broker license.

Comment: One commenter suggested adding a rule to preclude brokers from recruiting agents by advertising that an applicant may complete a program of study in less time that the number of credit hours awarded.

Response: The commission appreciates the suggestion but believes that the issue is addressed in the new rules simultaneously being adopted under Subchapter F of Chapter 535 regarding misleading advertising by schools.

The amendments and new rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.2. Broker Responsibility.

(a) A broker is required to advise a sponsored salesperson of the scope of the salesperson's authorized activities under the Act. Unless such scope is limited or revoked in writing, a broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly. If a broker permits a sponsored salesperson to conduct activities beyond the scope explicitly authorized by the broker, those too will be deemed to be authorized acts for which the broker is responsible.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision.

(c) A broker is responsible for the proper handling of trust funds placed with the broker, although the broker may authorize other persons to sign checks on behalf of the broker.

(d) A broker is responsible for any property management activity which requires a real estate license that is conducted by the broker's sponsored salespersons.

(e) A broker may designate another licensee to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of licensees sponsored by the broker. Any such designation must be in writing.

(f) Listings may only be solicited and accepted in a broker's name.

(g) A broker is responsible to ensure that a sponsored salesperson's advertising complies with §535.154 of this title (relating to Advertising).

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the following records, at a minimum, shall be maintained for at least four (4) years from the date of closing or termination of the contract in a format that can readily be made available to the commission.

(1) Disclosures;

(2) Commission Agreements such as listing agreements, buyer representation agreements or other written agreement relied upon to claim compensation;

(3) Work files;

(4) Contracts and related addenda;

(5) Receipts and disbursements of compensation for services subject to the Act;

(6) Property management contracts;

(7) Documents required by USPAP for appraisals; and

(8) Sponsorship agreements between the broker and sponsored salespersons.

(i) A broker shall maintain on a current basis written policies and procedures to ensure that:

(1) Each sponsored salesperson is advised of the scope of the salesperson's authorized activities subject to the Act and is competent to conduct such activities.

(2) Each sponsored salesperson maintains their license in active status at all times while they are engaging in activities subject to the Act.

(3) Any and all compensation paid to a sponsored salesperson for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored salesperson is provided on a timely basis, prior to the effective date of the change, notice of any change to the Act, Rules, or commission promulgated contract forms.

(5) In addition to completing statutory minimum continuing education requirements, each sponsored salesperson receives such additional educational instruction the broker may deem necessary to obtain and maintain on a current basis competency in the scope of the sponsored salesperson's practice subject to the Act.

(6) Each sponsored salesperson complies with the commission's advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are handled by the broker with appropriate controls.

(8) Records are properly maintained pursuant to subsection (h) of this section.

(j) A broker must promptly respond to sponsored salespersons, clients, and licensees representing other parties in real estate transactions.

(k) A sponsoring broker shall deliver to or otherwise provide, within a reasonable time after receipt, mail and other correspondence from the commission to their sponsored salespersons. A broker may deliver such correspondence by facsimile or email.

(l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.

(m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored salesperson.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DEFINITIONS

22 TAC §§535.12, 535.13, 535.15, 535.19, 535.21

The Texas Real Estate Commission (TREC) adopts the repeal of §535.12, regarding General; §535.13, regarding Dispositions of Real Estate; §535.15, regarding Negotiations; §535.19, regarding Locating Property; and §535.21, regarding Unimproved Lot Sales; Listing Publications, without changes to the proposal as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8252) and will not be republished.

The repeals are adopted because the subjects addressed in the subchapter heading and sections are covered in new amendments to Subchapter B which TREC is simultaneously adopting as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters and sections comprehensively address the subjects of the repealed rules, repeal of the rules is necessary to avoid confusion and repetition.

The reasoned justification for the repeals is more streamlined, consistent and readable rules.

No comments were received on the repeals as proposed.

The repeals are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. EXEMPTIONS TO REQUIREMENTS OF LICENSURE

22 TAC §§535.31, 535.32, 535.34

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.31, regarding Attorneys at Law; §535.32, regarding Attorneys in Fact; and §535.34, regarding Salespersons Employed by an Owner of Land and Structures Erected by the Owner, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8253) and will not be republished.

The amendments to §535.31 shorten the reference to the Act as defined in the definitions section of the rules. The amendments to §535.32 clarify that a power of attorney must be valid and changes the term "agency" to "brokerage." The amendments to §535.34 reference the provision in the Act to which it refers, clarify that an independent contractor is not an employee, and incorporate the text repealed from §535.35.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rules as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §535.35

The Texas Real Estate Commission (TREC or the commission) adopts the repeal of §535.35, regarding Employees Renting and Leasing Employer's Real Estate, without changes to the proposal as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8254) and will not be republished.

The repeal is adopted because the subjects addressed in the section are covered in new amendments to Subchapter C which TREC is simultaneously adopting as part of a comprehensive

rule review of 22 TAC Chapter 535. As the reformation of the subchapters and sections comprehensively address the subjects of the repealed rule, repeal of the rule is necessary to avoid confusion and repetition.

The reasoned justification for the repeal is more streamlined, consistent and readable rules.

No comments were received on the repeal as proposed.

The repeal is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. THE COMMISSION

22 TAC §535.42

The Texas Real Estate Commission (TREC or the commission) adopts an amendment to §535.42, regarding Jurisdiction and Authority without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8254) and will not be republished.

The amendment to §535.42 makes the section more readable. The amendment is adopted as part of a comprehensive rule review of 22 TAC Chapter 535.

The reasoned justification for the amendment is more streamlined, consistent and readable rules.

No comments were received on the rule as proposed.

The amendment is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §§535.50, 535.53 - 535.57

The Texas Real Estate Commission (TREC or the commission) adopts new §535.50, regarding Definitions; amendments to §535.53, regarding Corporations and Limited Liability Companies; new §535.54, regarding General Provisions Regarding Education and Experience Requirements for a License; new §535.55, regarding Education Requirements for a Salesperson License; new §535.56, regarding Education and Experience requirements for a Broker License; and new §535.57, regarding Examination Requirements for a License. Sections 535.54 and 535.56 are adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8255) and will be republished. Sections 535.50, 535.53, 535.55, and 535.57 are adopted without changes and will not be republished.

The differences between the rule as proposed and the rule as finally adopted are as follows: §535.54 is changed to clarify that a bachelor's degree from an accredited college or university counts towards all the related education requirements for a salesperson or broker license, and the proposed amendment regarding acceptance of associate's degrees is deleted. In new §535.56(b)(3), "eight-year" is changed to "six-year" to provide consistency with the change from six years to four years as detailed below.

The amendments and new rules are adopted as part of a comprehensive rule review of 22 TAC Chapter 535.

The definitions in §535.50 are moved from §535.71 and apply to Subchapter E regarding Requirements for Licensure; Subchapter F regarding Pre-License Education and Examination; and Subchapter G regarding Mandatory Continuing Education. Subchapter F only applies to examinations and accreditation of schools, instructors and courses in pre-license education programs.

The amendments to §535.53 clarify the requirements for obtaining and maintaining a broker license for a corporation or limited liability company. New subsection (c) of §535.53 provides that if a corporation or limited liability company is dissolved with the Office of the Secretary of State the license becomes null and void.

New §§535.54, 535.55, and 535.56 are moved from existing §535.63 in Subchapter F since these sections apply to general education, experience and examination requirements for a li-

cense and more appropriately fit under Subchapter E (Requirements for License). New subsection (b) in §535.54 provides that a bachelor's degree counts towards all the related education requirements for a salesperson license or broker license.

New §535.57 is moved from existing §535.61. The commission has the authority under §1101.362 of the Act to waive some or all of the education and experience requirements for someone who has been licensed within the six years preceding the date the application is filed. Under current §535.56, the commission has waived the education and experience required for a broker license for a broker who was licensed in the preceding six years (the maximum authorized under the Act) and otherwise meets the requirements of the section. The rule changes the period from six years to four years so that a person who was licensed in the preceding four years and otherwise meets the requirements of the section (experience) could apply for a broker license. Under new §535.56, the applicant would be required to take the examination if the applicant was licensed more than two years prior to the filing of the application.

Generally speaking, the amendment and new rules correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The revisions to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed versions and do not materially alter the issues raised in the proposed rules.

The reasoned justification for the amendments is more streamlined, consistent and readable rules, and to ensure adequate education of brokers getting back into the industry after being out for a significant period of time.

The Texas Association of Realtors and the Metrotex Association of Realtors commented on 22 TAC §535.54.

The commission received six comments on the rules as proposed.

Comment: One commenter believes that the commission should evaluate anyone with an associate's degree to determine whether the courses taken meet the related course requirements for a salesperson license.

Response: The commission agrees with the commenter and has changed the rule to be consistent with the comment.

Comment: Two commenters disagree with the proposed changes to §535.54 because they believe that it lowers the bar for licensing of salespersons and brokers.

Response: The commission has changed the rule to be consistent with the comment with respect to an associate's degree. With respect to a bachelor's degree, the commission respectfully disagrees with the commenters. Staff experience with evaluation of applicants with bachelor degrees shows that there are normally sufficient basic education requirements in such degree programs to meet the related course requirements for a salesperson or broker license. In addition, the commission has revised the rule to clarify that only bachelor's degrees from accredited colleges or universities will be deemed to meet the related course requirements for a license.

Comment: Two commenters disagree with the proposed changes to §535.54 because they believe that it lowers the bar for licensing of salespersons and brokers because the commission would be accepting the bachelor's degree to count for all education requirements.

Response: The commission respectfully clarifies to the commenters that §535.54(b) applies only to related coursework, not real estate education.

Comment: One commenter disagrees with the changes to §535.56 because the commenter believes that it waters down the requirements for a broker's license.

Response: The commission respectfully disagrees with the comment. The changes would permit an applicant to use existing education requirements if the applicant had been previously licensed no more than four years before. The existing rule permits an applicant with a previous broker's license to reapply within six years based on then existing education requirements. Therefore, the new rule actually raises the bar by changing the time period from six to four years.

The amendments and new rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.54. General Provisions Regarding Education and Experience Requirements for a License.

(a) License or experience in another state. Except as provided by this subchapter and the Act, the commission will not accept a person's license in another state or experience in real estate brokerage or any related business in satisfaction of education or experience required for a license.

(b) Coursework requirements in related subjects. A person who has earned a bachelor's degree from an accredited college or university will be deemed to have completed the number of related hours required for a salesperson or broker license.

(c) The commission will not grant credit to a student who was previously awarded credit for completing a course with substantially the same course content within the previous two-year period.

§535.56. Education and Experience Requirements for a Broker License.

(a) An applicant for a broker license must have two years of experience actively practicing as a broker or salesperson in Texas during the 36 months prior to filing the application, as follows:

(1) Experience is measured from the date a license is issued, and inactive periods caused by lack of sponsorship, or any other reason, cannot be included as active experience.

(2) Under §1101.357 of the Act, a person who is the designated officer of a corporation or limited liability company that is licensed as a real estate broker in another state is deemed to be a licensed real estate broker in another state. A person licensed in another state may derive the required two years' experience from periods in which the person was licensed in one or more states.

(b) Notwithstanding §1101.451(f) of the Act, the commission may waive education and experience required for a real estate broker license if the applicant satisfies each of the following conditions.

(1) The applicant was licensed as a Texas real estate broker or salesperson within four years prior to the filing of the application.

(2) If the applicant was previously licensed as a Texas real estate broker, the applicant has completed at least 15 hours of mandatory continuing education (MCE) courses within the two-year period prior to the filing of an application for an active license. If the applicant was previously licensed as a Texas real estate salesperson, the applicant satisfies all current education requirements for an original broker license.

(3) The applicant has at least two years of active experience as a licensed real estate broker or salesperson during the six-year period prior to the filing of the application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. PRE-LICENSE EDUCATION AND EXAMINATION

22 TAC §§535.61 - 535.68

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.61, regarding examinations; §535.62, regarding Acceptable Courses of Study; new §535.63, regarding Accreditation of Core Education Schools; new §535.64, regarding Obtaining Approval to Offer a Course; new §535.65, regarding Operation of Core Education Schools; new §535.66, regarding Core Education Providers: Audits, Investigations, and Enforcement Actions; new §535.67, regarding Approval of Instructors; and new §535.68, regarding Additional Information Related to an Application. Sections 535.64 and 535.65 are adopted with changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8706) and will be republished. Sections 535.61 - 535.63 and 535.66 - 535.68 are adopted without changes and will not be republished.

The differences between the rule as proposed and the rule as finally adopted are as follows: Section 535.64(d) corrects a typographical error referencing §535.62(g) to the correct reference of §535.62(f); 535.65(4) clarifies that a school may rely on published objective information such as pass rates in advertising regarding the school's course of instruction; §535.65(9)(D) regarding records retention is clarified to address records that are maintained in an electronic format; and §535.65(10) is changed to require schools to use, at a minimum, course and instructor evaluation criteria established by the commission, rather than requiring schools to use evaluation forms approved by the commission.

The commission renames the subchapter name from "Education, Experience, Educational Programs, Time Periods and Type of Licensure" to "Pre-License Education and Examination."

The subchapter name as amended more appropriately addresses the new content of the subchapter which TREC is simultaneously adopting as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters comprehensively addresses the subjects of the adopted amendments and new rules, it is necessary to avoid confusion and repetition.

Section 535.61 is amended to delete a redundant provision regarding the confidentiality of the examination as contents of the examination are confidential under the Texas Public Information Act, Texas Government Code Chapter 552. The amendments to §535.61(a)(1) and (3) remove the requirements of intent or knowledge. Thus, engaging in any of the listed activities with respect to the TREC exam is considered grounds for disciplinary action regardless of the intent or knowledge of the applicant or licensee. Subsections (f) and (g) are moved to new §535.57.

The amendments to §535.62(a) delete a reference to acceptable real estate related courses as the term "related course" is defined in new §535.50. The following amendments to §535.62 are adopted as part of the reformation of the section to group similar subjects into the same sections and to clarify the subject matter of each rules. Paragraphs (1) and (2) of subsection (a) are moved from existing §535.62(f)(1) and (2); the first sentence of subsection (b) is moved from §535.62(b); paragraph (5) of subsection (b) is amended to track the terminology used in the Act; subsection (c) is reworded for clarity; paragraphs (3) and (4) of subsection (d) are moved from existing §535.62(d)(9) and (e). Subsections (e) - (g) are moved from other parts of existing §535.62 to put like subject matter together. Existing §535.62(d)(6)(B) regarding courses offered by an alternative delivery method was deleted because distance learning certification (required under §535.62(g)(1)) ensures the requirements of that subparagraph and it was therefore redundant. Although the remaining provisions of §535.62 indicate that they were deleted, there were moved to other sections for clarity.

Existing §535.63 was repealed and moved to new §§535.54 - 535.56. Much of new §535.63 is moved from existing §535.64 which addresses accreditation of schools. The renewal period for accreditation of schools is changed from five years to four years in §535.63(b). For purposes of calculation a school's passage rate in §535.63(b)(3), the commission will use a four-year period instead of a five-year period (current). Thus a school's passage rate will be calculated by dividing the number of students affiliated with that school who passed the examination on their first attempt in the four-year period ending on the last day of the previous quarter by the total number of the school's graduates who took the exam for the first time in the same period.

Existing §535.64 is repealed and replaced with new §535.64 which contains the parts of existing §535.64 that deal with obtaining approval to offer a course. There are new course renewal provision in subsections (f) and (g) of new §535.64. A course approval expires four years from the date of approval, and if any school that offers the same course obtains TREC approval to offer the same course, the expiration date remains unchanged. The requirement in existing §535.64 that examination preparation course be submitted to TREC for approval is deleted.

Existing §535.65 is repealed and replaced with new §535.65. The text of new §535.65 comes from existing §535.65 except

that it has been rearranged, streamlined and reformatted for clarity and consistency. A new provision in paragraph (2)(D) addresses the requirements for schools which do not maintain an office in the State of Texas. A provision in paragraph (10) clarifies that a school must provide to students and maintain for commission review instructor and course evaluation for each course. At a minimum, schools must use evaluation criteria approved by the commission. Under paragraph (9)(D), a school is required to maintain records of each student enrolled for a minimum of four years; and the full class file and student enrollment agreements must be retained for at least 24 months following completion; records may be retained electronically if they are held in a common format such as pdf or html.

Existing §535.66 is repealed and replaced with new §535.66. The text of new §535.66 comes from existing §535.66 except that it has been rearranged, streamlined and reformatted for clarity and consistency.

New §535.67 contains the part of existing §535.64 that deals with approval of instructors. The renewal period for instructor approval is changed from five years to two years.

New §535.68 contains the parts of existing §535.64(m) which deal with additional information related to an application for a school, course or instructor; and §535.64(n) which addresses the commission's delegation of authority to staff.

Generally speaking, the amendments and new sections correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The revisions to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed versions and do not materially alter the issues raised in the proposed rules. The changes in the rules reflect a nonsubstantive variation from the proposed rules to make the affected rule consistent with other rules.

The reasoned justification for the amendments is more streamlined, consistent and readable rules, and more accountability for schools, instructors, and courses accredited by the commission.

The Texas Association of Realtors and the Texas Apartment Association commented on the rules as proposed.

The commission received four comments on the rules as proposed.

Comment: Three commenters suggested that the commission should not require that schools use a commission approved form for course and instructor evaluations. Instead, the commission should permit schools to use their own forms as long as they use commission approved criteria at a minimum.

Response: The commission agrees with the comments and has changed the rules accordingly.

Comment: Two comments suggested that the commission should clarify that schools may rely on published objective information such as pass rates for advertising purposes.

Response: The commission agrees with the comments and has changed the rules accordingly.

Comment: One commenter disagrees with changing the approval process for instructors from five years to two years.

Response: The commission respectfully disagrees with the commenter and believes it is appropriate to change the renewal period to two years to be consistent with renewal periods for a license from the agency.

Comment: Two commenters suggested that the commission should clarify records retention requirements for records held in an electronic format.

Response: The commission agrees with the comments and has revised §535.65(9)(D) accordingly.

The amendments and new rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.64. Obtaining Approval to Offer a Course.

(a) An applicant shall submit a Course Application form and pay the fee required by §535.101 of this title (relating to Fees) to obtain approval to offer a course. Prior approval is required for another school to offer the same course.

(b) A school shall submit an instructor's manual for each proposed course. The commission may require a copy of the course materials and instructor's manual to be submitted for each previously approved course a school intends to offer. Subsequent providers shall offer the course as originally approved or as revised with the approval of the commission and shall use all materials required in the original or revised course. Each manual must comply with Instructor Manual Guidelines approved by the commission.

(c) The commission is not required to approve a course sooner than 30 days after the filing of an application for course approval.

(d) For the purpose of approval of courses, a correspondence course offered by a school in association with an accredited college or university in accordance with §535.62(f) of this title (relating to Acceptable Courses of Study), is equivalent to a correspondence course offered by an accredited college or university.

(e) Schools may offer a course using an alternative delivery method such as computers if the course satisfies the requirements for such a course contained in §535.62(g) of this title.

(f) A course approval expires four years from the date of approval. A course that has been approved by the commission may be offered by the original applicant until the expiration date, except that courses approved prior to the effective date of this section expire two years after the effective date. If any school other than the original applicant obtains approval from the commission to offer the same course, the expiration date remains unchanged.

(g) Course renewal. No more than six months prior to the expiration of a course approval, a school may obtain a course approval for another four year period. Approval or disapproval of a course shall be subject to the standards for initial course approval.

§535.65. Operation of Core Education Schools.

The following provisions apply to schools accredited by the commission to offer core education programs.

(1) Responsibility of schools. A school is responsible to the commission for the conduct and administration of each course

presentation, punctuality of classroom sessions, student attendance records, instructor performance and attendance, examination administration, proper student certification, and certification of records. A school shall establish business hours during which school staff are available for public inquiry and assistance. A school shall ensure that instructors or other persons do not recruit or solicit prospective salespersons or brokers in a classroom during class time.

(2) School facilities.

(A) A school shall ensure that its classroom facilities are adequate for the needs of the school and pose no threat to the health or safety of students.

(B) Except as provided by this section, every school shall be open to the public, and shall advertise all courses publicly so as to encourage reasonably an open enrollment. A school may obtain approval from the commission, however, to hold classes in facilities to which access has been limited by a governmental unit.

(C) If a school maintains an office in the State of Texas, the office must be large enough for maintenance of all records, office equipment, files, telephone equipment, and office space for customer service.

(D) If a school does not maintain a fixed office in this state for the duration of the school's approval to offer courses, the school shall designate a resident of this state as attorney-in-fact to accept service of process and act as custodian of any records in Texas that the school is required to maintain by these sections. A power-of-attorney designating the resident must be filed with the commission in a form acceptable to the commission.

(3) Instructors.

(A) A school shall select each instructor on the basis of expertise in the subject area of instruction and ability as an instructor. Except as provided by this section, a school may not utilize an instructor unless the instructor has been approved by the commission. A school shall require specialized training or work experience for instructors for specialized subjects such as law, appraisal, investments, or taxation. A school may use as a guest speaker a person who has not been approved as an instructor, provided that no more than a total of three hours of instruction in a 30-hour course are taught by persons who are not approved instructors.

(B) An instructor shall teach a course in substantially the same manner represented to the commission in the instructor's manual or other documents filed with the application for course approval.

(C) A school shall ensure that at the beginning of each examination preparation course, the instructor reads aloud to all students the provisions of §535.61(a) of this title (relating to Examinations).

(D) Schools may request MCE credit be given to instructors of real estate core courses subject to the following guidelines.

(i) The instructors may receive credit for only those portions of the course which they teach by filing a completed Instructor Credit Request.

(ii) The instructors may receive full course credit by attending all of the remainder of the course.

(4) Advertising. The following practices are prohibited:

(A) using any advertising which does not contain the school's name;

(B) representing that the school's program is the only vehicle by which a person may satisfy educational requirement for licensing;

(C) conveying a false impression of the school's size, importance, location, equipment or facilities;

(D) making unsubstantiated claims that the school's programs are superior to any other course of instruction, except that a school may use objective information published by the commission regarding pass rates;

(E) promoting the school directly or indirectly as a job placement agency, unless the school is participating in a program recognized by federal, state, or local government and is providing job placement services to the extent the services are required by the program; or

(F) making any statement which is misleading, likely to deceive the public, or which in any manner tends to create a misleading impression.

(5) Pre-enrollment agreements, tuition and fees.

(A) Prior to the start of a course, a school shall provide each student with a pre-enrollment agreement signed by a representative of the school and the student. The agreement must include all of the following information:

(i) the tuition for the course;

(ii) any fees charged by the school for supplies, materials, or books needed in course work, shown in an itemized fashion;

(iii) the school's policy regarding the refund of tuition and other fees, including a statement addressing refund policy when a student is dismissed or withdraws voluntarily;

(iv) attendance requirements;

(v) acceptable makeup procedures, including any applicable time limits and any fees that may be charged for makeup sessions; and

(vi) the procedure and fees for taking any permitted makeup final examination or any permitted re-examination, including any applicable time limits.

(B) If the school cancels a course, the school shall fully refund all fees collected from students or, at the student's option, the school may credit the student for another course. The school shall inform the commission when a student requests a refund because of a withdrawal due to the student's dissatisfaction with the quality of the course.

(C) Any written advertisement by the school that includes a fee charged by the school must display all fees for the course in the same place in the advertisement and with the same degree of prominence.

(6) Course materials.

(A) A school shall update course materials to ensure that current and accurate information is provided to students. The school shall file updated course materials and revisions of the course outline with the commission prior to implementation, and the commission may direct a school to revise the materials further or cease use of materials. The commission may direct that the school withdraw texts.

(B) A school shall provide each student with copies for the student's permanent use of any printed material which is the basis for a significant portion of the course. The school shall provide ample

space on handouts for notetaking or completion of any written exercises.

(7) Presentation of courses.

(A) A school shall present core real estate courses prescribed by §1101.003 of the Act and real estate related courses accepted by the commission in no less than 30 classroom hours of instruction. The school shall advertise and schedule a course for the full clock hours of time for which credit is awarded.

(B) A school may give one hour of credit for a minimum of 50 clock minutes of actual classroom session time. A school shall provide a break of at least 20 minutes to be given at least every two hours. While a school is expected to ensure that each student is present in the classroom for the hours of time for which credit is awarded, this section is not intended to penalize students who must leave the classroom for brief periods of time for personal reasons.

(8) Course examinations.

(A) A school shall administer an examination approved by the commission in each course as a component of determining successful completion of a course of study. A school may not permit a student to take a final examination prior to the completion of any makeup required by this section. In the event of failure of a course final examination, a school may permit a student to retake a final examination once after at least a seven day waiting period and completion of additional course work prescribed by the school. A school shall require a student who fails the examination a second time to retake the course. A school shall require makeup final examinations to be completed within 90 days of the termination of the original class or report the students who do not timely complete the examination requirement as dropped from the class with no credit.

(B) Except in the case of math courses, which require a minimum of 20 questions, a school shall use final examinations consisting of at least 60 questions with an unweighted passing score of 70%. A school shall revise final course examinations for active courses at least annually and shall furnish the commission copies of all revisions. Each of the subjects required by the Act or Rules for a core course must be covered in the exam of that course. A school shall ensure that an examination proctor who is either a member of the school staff or faculty is present with the class during all regularly scheduled final course examinations.

(9) Course credit and records.

(A) Within ten days following the completion of other than an alternative delivery method course or correspondence course, a school shall provide the commission with a class roster in a format approved by the commission. For an alternative delivery method course or correspondence course, a school shall provide a roster of those students completing the course within 10 days after the end of the month in which the student completed the course. The listing of students must be numbered and in alphabetical order, with each student's last name shown first, and must show after each student's name the final grade of either passed, failed, incomplete, or dropped, in language or symbols that can be correlated with these categories. The school shall explain any other grade concisely but clearly. The school shall list all instructors used in the course on the roster.

(i) "Passed" must be limited to those students who attended all of the scheduled classes or completed acceptable makeup and who successfully passed the final course examination based on passing standards approved by the commission.

(ii) "Failed" must be limited to those students who had acceptable classroom attendance but failed the final course examination. If, however, the school permits the student to retake the examination in accordance with paragraph (8) of this section, the first failure must be reported as an incomplete grade.

(iii) "Incomplete" must be limited to those students who met the attendance requirements, but did not take the final course examination; those who attended at least two-thirds of the scheduled course hours but did not complete acceptable makeup; or those who fail the final course examination but will be permitted to take a second examination. If a student is reported incomplete and later completes acceptable makeup and the final examination, the school shall file a supplemental report with the commission giving the student's name and final grade report and using the same format and course data as the original class report. The school shall file a separate supplemental report for each individual class but may include more than one student on the report if all students were in the same original class.

(iv) "Dropped" must be limited to those students who missed more than one-third of the scheduled class in which they were originally enrolled; those who voluntarily terminated their enrollment; or those whose enrollment was terminated for cause by a school director.

(B) A school may permit a student who attends at least two-thirds of a scheduled course to complete makeup work to satisfy attendance requirements. Acceptable makeup procedures are the attendance in the corresponding class sessions in a subsequent offering of the same course or the supervised presentation by audio or video recording of the class sessions actually missed. A school shall require all class makeup sessions to be completed within 90 days of the completion of the original course, or the student must be considered dropped with no credit for the course. A member of the school's staff must approve the makeup procedure to be followed. A student attending less than two-thirds of the originally scheduled course must automatically be dropped from the course without credit and reported as dropped. Dropped status may not be changed by makeup sessions, and any hours accumulated may not be transferred to any other course.

(C) A school shall issue to the students successfully completing a course of instruction an official certificate which reflects the school's name, branch, course title, course numbers, and the number of classroom hours (or other recognized educational unit) involved in the course. All core course certificates must show the statutory core course title or other identification as prescribed by the commission. Certificates also must show the date of issuance and be signed by an official of the school, or if the certificate is computer printed, the school logo may be substituted for the signature. Letters or other official communications also may be provided to students for submission to the commission as evidence of satisfactory completion of the course. Such letters must fully reflect the school name, the course title and number, educational units, and be dated and signed by an official of the school, or if the letter is computer printed, the school logo may be substituted for the signature. A school shall maintain adequate security for completion certificates and letters. Compliance with this requirement will be determined by the commission during all school audits. A school may withhold a student's certificate of completion of a course until the student has fulfilled the student's financial obligation to the school.

(D) A school shall maintain records of each student enrolled in any course for a minimum of four years. The full class file, including course and instructor evaluations and student enrollment agreements must be retained for at least 24 months following completion of the class. Records may be maintained electronically but must be in a common format, such as pdf or html, that may be legibly and easily printed or viewed without additional manipulation or unusual software.

(E) A school shall maintain financial records sufficient to reflect at any time the financial condition of the school. A school's financial statement and balance sheets must be available for audit by commission personnel, and the commission may require presentation of financial statements or other financial records.

(10) Instructor and Course Evaluations. A school shall provide instructor and course evaluation forms for completion by students in every course. A school shall, at a minimum, use evaluation criteria approved by the commission. The school shall file in the school records any comments by the school's management relevant to instructor or course evaluations. On demand by the commission the school shall produce instructor and course evaluation forms for inspection.

(11) Changes in Ownership or Operation. A school shall obtain the approval of the commission in advance of any material change in the operation of the school, including but not limited to, ownership, location of main office and any other locations where courses are offered, management, and course formats. A request for approval of a change of ownership will be considered as if each proposed new owner had applied for accreditation of the school, and each new owner must meet the standards imposed by §535.63 of this title (relating to Accreditation of Core Education Schools). A school requesting approval of a change in ownership shall provide all of the following information or documents to the commission:

(A) the proportion of ownership of each proposed new owner;

(B) a professional resume of each proposed new owner who would hold at least a 10% interest in the school;

(C) business financial statements of each proposed new owner who would hold at least a 10% interest in the school, which shall include the statement of financial condition and statement of net worth for the accounting period in which the application is made, prepared in accordance with generally accepted accounting principles;

(D) a statement of any proposed changes in the operation or location of the school;

(E) a new bond in the amount of $20,000 for the proposed new owner(s), a statement from the bonding company indicating that the former bond will transfer to the proposed new owner(s), or other security acceptable to the commission under §1101.302 of the Act;

(F) a completed Education Provider Application reflecting all required information for the proposed new owner(s); and

(G) a completed Principal Information Form for each proposed new owner who would hold at least a 10% interest in the school.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006912
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: January 1, 2011
Proposal publication date: September 24, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §§535.63 - 535.66

The Texas Real Estate Commission (TREC or the commission) adopts the repeal of §535.63, regarding Education and Experience Requirements for a License; §535.64, regarding Accreditation of Schools and Approval of Courses and Instructors; §535.65, regarding Changes in Ownership or Operation of School; Presentation of Courses, Advertising, and Records; and §535.66, regarding Payment of Annual Fee, Audits, Investigations and Enforcement Actions, without changes to the proposal as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8715) and will not be republished.

Existing §535.63 is repealed and language is moved to new §§535.54 - 535.56. Much of new §535.63 is moved from existing §535.64 which addresses accreditation of schools.

Existing §535.64 is repealed and replaced with new §535.64 which contains the parts of existing §535.64 that deal with obtaining approval to offer a course.

Existing §535.65 is repealed and replaced with new §535.65. The text of new §535.65 comes from existing §535.65 except that it has been rearranged, streamlined and reformatted for clarity and consistency.

Existing §535.66 is repealed and replaced with new §535.66. The text of new §535.66 comes from existing §535.66 except that it has been rearranged, streamlined and reformatted for clarity and consistency.

The reasoned justification for the repeals is more streamlined, consistent and readable rules.

No comments were received on the repeals as proposed.

The repeals are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2010.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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Proposal publication date: September 24, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §§535.71 - 535.74

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.71, regarding Approval of Providers, Courses, and Instructors; §535.72, regarding Presentation of Courses, Advertising and Records; §535.73, regarding Compliance and Enforcement; and new §535.74, regarding Additional Information Related to an Application. Sections 535.71 and 535.72 are adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8257) and will be republished. Sections 535.73 and 535.74 are adopted without changes and will not be republished.

The differences between the rules as proposed and the rules as finally adopted are as follows: A typographical error in §535.71(bb) was corrected to reference "subsection (r)" instead of "subsection (l)." Section 535.72(i) is changed to require schools to use, at a minimum, course and instructor evaluation criteria established by the commission, rather than requiring schools to use evaluation forms approved by the commission.

TREC is simultaneously adopting the amendments and new rule as part of a comprehensive rule review of 22 TAC Chapter 535.

The amendments to §535.71(a) delete the definitions as they have been moved to Subchapter E. Subsection (b) is deleted because the requirements are referenced under §535.92; subsection (c) is deleted because the application forms will be approved by the commission but not promulgated by rule; all the subsections are relettered; the renewal term for instructor approval is changed from five to two years in subsections (i) and (j); alternative delivery method courses for required legal credit will need to be certified by a distance learning certification center that is acceptable to the commission under new subsection (z); some of the paragraphs of subsection (z) are deleted and renumbered because distance learning certification ensures the requirements of that subparagraph and it was therefore redundant. Currently, the only distance learning certification center deemed acceptable by the commission is the International Distance Education Certification Center approved by the commission as acceptable in 2007 based on the alternative delivery method course requirements in place at the time the rule was adopted.

The amendments to §535.72 delete the reference to specific form numbers as they will no longer be promulgated by rule. Subsection (i) is a new provision which requires a provider to make available to students and maintain for commission review instructor and course evaluation for each course. Schools are required to use, at a minimum, course and instructor evaluation criteria established by the commission.

Under relettered subsection (k), a provider is required to maintain the same types of records and for the same period of time as required of schools accredited under Subchapter F regarding core education providers.

The amendments to §535.73 delete the reference to evaluations as evaluations are now covered in the amendments to §535.72.

New §535.74(a) deals with additional information related to an application for an MCE provider, course or instructor; and subsection (b) which addresses the commission's delegation of authority to staff.

Generally speaking, the amendments and new rule correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules, and more accountability for schools, instructors, and courses accredited by the commission.

The revisions to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed versions and do not materially alter the issues raised in the proposed rules. The changes in the rules reflect a nonsubstantive variation from the proposed rules to make the affected rule consistent with other rules.

The Texas Association of Realtors and the Texas Apartment Association commented on the rules as proposed.

The commission received four comments on the rules as proposed.

Comment: Two commenters expressed concern about the criteria used by the commission to determine acceptability of distance education certification centers.

Response: The commission determined in 2007 that the ARELLO International Distance Education Certification Center or IDECC met the commission standards to approve distance education courses. While other entities may provide similar certification services, the commission would need to approve the entity before the commission would accept distance education certification from the entity for distance learning courses. The criteria used to approve IDECC were based on the commission rules in place at the time.

Comment: Three commenters suggested that the commission should not require that schools use a commission approved form for course and instructor evaluations. Instead, the commission should permit schools to use their own forms as long as they use commission approved criteria at a minimum.

Response: The commission agrees with the comments and has changed the rules accordingly.

Comment: One commenter expressed concerns about the amendments to §535.71(z)(2) regarding certification of required legal and ethics MCE courses offered by alternative delivery method. The commenter believes that certification by a distance learning certification center should not be required because existing rules require that such courses meet certain criteria that the certification center would evaluate and therefore certification by such entity would be redundant with the criteria that TREC staff currently evaluates.

Response: The commission respectfully disagrees with the commenter. Similar to the determination made by the commission in 2007 to require distance education certification for core courses offered by alternative delivery method, certification by an independent entity created for the purpose of evaluating such things as mastery, timing, security, etc. (those criteria unique to courses offered by alternative delivery method) is a reasonable requirement for MCE providers to meet prior to submitting the course for TREC approval so that TREC staff may more appropriately focus on whether such courses meet substantive requirements.

Comment: Two commenters suggested that the commission should clarify records retention requirements for records held in an electronic format.

Response: The commission agrees with the comments and has revised Subchapter F, §535.65(9)(D) and referenced such requirements in Subchapter G, §535.72(k).

The amendments and new rule are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.71. Approval of Providers, Courses, and Instructors.

(a) Provider application. To be approved as an MCE provider, a person must satisfy the commission as to the person's ability to administer with honesty, trustworthiness and integrity a course of continuing education in MCE subjects registered with the commission. If the person proposes to employ independent contractors to conduct or to administer the courses, any independent contractor named in the application must meet this standard as if the independent contractor were the applicant; however, the applicant is responsible for responding to communications from the commission relating to the application.

(b) Additional information related to application. The commission may request that an applicant provide additional information, and the commission may terminate an application without further notice if the applicant fails to provide the additional information within 60 days of the mailing of a request by the commission.

(c) Fees. The commission shall establish fees in accordance with the provisions of §1101.152 of the Act, at such times as the commission deems appropriate. Fees are not refundable and must be submitted in the form of a check or money order, or, in the case of state agencies, colleges or universities, in a form of payment acceptable to the commission.

(d) Approval of applicants. The commission may authorize the manager or director of the education and licensing services division of the commission, or a designate, to determine whether applications for MCE providers or instructors should be approved or certified. The commission may disapprove an application for failure to satisfy the commission as to the applicant's honesty, trustworthiness or integrity, or for any reason which would be a ground to suspend or revoke a real estate license. If an application is disapproved, the commission shall provide written notice to the applicant detailing the basis of the decision.

(e) Appeal. An applicant may appeal disapproval by filing with the commission a written request for a hearing within 10 days after the receipt of the notice of disapproval. Following the hearing, the commission may sustain or withdraw the disapproval or establish conditions for the approval of a provider, course or instructor. Proceedings involving applications shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001. Venue for any hearing conducted under this section shall be in Travis County.

(f) Power of attorney. If a provider does not maintain a fixed office in this state for the duration of the provider's approval to offer courses, the provider shall designate a resident of this state as attorney-in-fact to accept service of process and act as custodian of any records in Texas which the provider is required to maintain by these sections. A power-of-attorney designating the resident must be filed with the commission in a form acceptable to the commission.

(g) Subsequent application for provider approval or course registration. Unless withdrawn earlier for cause as provided by these sections, a provider's authority to offer courses for which MCE credit is given expires two years from the date the provider is approved by the commission. Authority to offer any MCE courses ends with the expiration of the provider's approval, and the provider must pay current fees and reapply for approval as a provider in order to offer MCE courses again. An elective credit course registered with the commission may be offered by the provider for a period of two years after the course is registered or until the provider's authority to act as a provider finally expires or is withdrawn for cause, whichever first occurs. If a course was originally registered by another provider, the registration period is measured from the date of registration for the original provider. A provider may apply for approval to be a provider for another two years no sooner than six months prior to the expiration of existing provider approval.

(h) Approval of instructor. A person who wishes to be an instructor of any MCE course shall apply to the commission for approval using an application form approved by the commission. To be approved as an instructor of any MCE course, an applicant must satisfy the commission as to the applicant's honesty, trustworthiness and integrity. Subsections (b) - (e) of this section apply to an applicant for approval of an instructor.

(i) Term of instructor approval. If the commission determines that the applicant meets the standards for instructor approval, the commission shall approve the application and provide a written notice of the approval to the applicant. Unless surrendered or revoked for cause, the approval will be valid for a period of two years.

(j) Subsequent application for instructor approval. No more than six months prior to the expiration of the current approval, an instructor may apply for approval for another two year period.

(k) Required legal update and ethics courses. The commission shall approve bi-annually a legal update course and a legal ethics course which shall be conducted through providers by instructors certified by the commission under this subchapter. The subject matter and course materials for the courses shall be created for and approved by the commission. The courses expire on December 31 of each odd-numbered year and shall be replaced with new courses approved by the commission. A provider may not offer a new course until an instructor of the course obtains recertification by attending a new instructor training program. Providers must acquire the commission-developed course materials and utilize such materials to conduct the required legal courses. The required legal courses must be conducted as prescribed by the rules in this subchapter and the course materials developed for the commission.

(l) Modification of the required legal courses. Providers and instructors may modify a required legal course only to provide additional information on the same or similar topics covered in the course or to create distance learning courses that are substantially similar to the live courses developed for the commission. To the extent that a required legal course is modified or integrated into a longer course for which additional elective credit is requested, the commission shall grant elective and legal credit for the combined course.

(m) Instructor certification. Only instructors certified by the commission may teach the required legal courses or develop distance learning courses for the presentation of required legal courses. An instructor must obtain prior commission approval under subsection (n) of this section prior to attending an instructor training program. The

commission shall issue a written certification to an instructor to teach the applicable required legal course(s) upon the instructor's satisfactory completion of a training program to teach the required legal course(s) that is acceptable to the commission. An instructor may obtain certification to teach either one or both required legal courses. A certified legal course instructor may teach the required legal courses for any approved provider after the instructor has attended an instructor training program. A certified legal course instructor may not independently conduct a required legal course unless the instructor has also obtained approval as a provider. An instructor must obtain written certification from the commission prior to teaching the required legal courses and prior to representing to any provider or other party that he or she is certified or may be certified as a legal course instructor. An instructor's certification to teach a required legal course expires on December 31 of every odd-numbered year. An instructor may obtain recertification by attending a new instructor training program.

(n) Standards for approval of instructors of required legal courses. Prior to attending an instructor training course, a person must obtain commission approval to be an instructor using Instructor Application - Core, Legal Update, and Ethics, approved by the commission. To be approved as an instructor of a required legal update or ethics course, a person must possess the following qualifications:

(1) a college degree in the subject area of Real Estate, or five years of professional experience in the subject areas of Principles of Real Estate, Law of Agency, and Law of Contracts; and

(2) three years experience in teaching or training; or

(3) the equivalent of paragraphs (1) and (2) of this subsection as determined by the commission after due consideration of the applicant's professional experience, research, authorship or other significant endeavors in the subject area.

(o) Approval of instructor. If the commission determines that the applicant meets the standards for instructor approval, the commission shall approve the application and provide a written notice of the approval to the applicant. Unless surrendered or revoked for cause, the approval will be valid for a period of two years.

(p) Elective credit courses. To be approved to offer a course for MCE elective credit, the provider must demonstrate that the course subject matter is appropriate for a continuing education course for real estate licensees and that the information provided in the course will be current and accurate by submitting a brief statement that describes the objective of the course and explains how the subject matter is related to activities for which a real estate license is required, including but not limited to relevant issues in the real estate market or topics which increase or support the licensee's development of skill and competence.

(q) Elective course application. A provider applicant must submit an MCE Course Application and receive written acknowledgment from the commission prior to offering an MCE elective course. Prior to advertising or offering a course offered by another provider, the subsequent provider must submit a Course Application Supplement and receive written acknowledgment from the commission.

(r) Legal update and legal ethics course application. A provider must submit a MCE Course Application Supplement and receive written acknowledgment from the commission prior to offering a required legal update or required legal ethics course.

(s) Core courses for elective credit. Courses approved by the commission for core real estate course credit provided in §1101.356 and §1101.358 of the Act may be accepted for satisfying MCE elective credit course requirements provided the student files a course completion certificate with the commission.

(t) Acceptable combined courses. An elective credit course offered by a provider to satisfy all or part of the nine hours of other than legal topics required by §1101.455 of the Act may be offered with the required legal update course or required legal ethics course.

(u) Required legal courses for real estate related courses. MCE legal update and legal ethics courses may be accepted by the commission as real estate related courses for satisfying the education requirements of §1101.356 and §1101.358, of the Act.

(v) Correspondence courses for elective credit. An MCE provider may register an MCE elective course by correspondence with the commission if the course is subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of §1101.455 of the Act and this section; and

(3) the course does not include a request for required legal course credit.

(w) Alternative delivery method courses for elective credit. An MCE provider may register an MCE elective course by alternative delivery method with the commission if the course is subject to the following conditions:

(1) the content of the course must satisfy the requirements of §1101.455 of the Act and this section;

(2) the course does not include a request for required legal course credit; and

(3) every provider offering a registered course under this subsection shall:

(A) ensure that a qualified person is available to answer students' questions or provide assistance as necessary;

(B) provide that procedures are in place to ensure that the student who completes the work is the student who is enrolled in the course; and

(C) certify students as successfully completing the course only if the student:

(i) has completed all instructional modules; and

(ii) has attended any hours of live instruction and/or testing required for a given course.

(x) Correspondence courses for required legal credit. The commission may approve a provider to offer an MCE required legal ethics course by correspondence subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of §1101.455 of the Act and this section and must be substantially similar to the legal courses disseminated and updated by the Commission;

(3) students receiving MCE credit for the course must pass either:

(A) a proctored final examination administered under controlled conditions to positively identified students, at a location and

by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(B) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit; and

(4) written course work required of students must be graded by an approved instructor or the provider's coordinator or director, who is available to answer students' questions or provide assistance as necessary, using answer keys approved by the instructor or provider.

(y) Each required legal course offered by correspondence must contain the following:

(1) course description;

(2) learning objectives;

(3) evaluation techniques;

(4) lessons;

(5) learning activities;

(6) final examination;

(7) source materials disseminated by the Commission including all updates; and

(8) instructor grading guidelines, including acceptable answers for lessons, assessments and examinations.

(z) Alternative delivery method courses for required legal credit. The commission may accept required legal courses offered by alternative delivery method subject to the following conditions.

(1) The content of the course must satisfy the requirements of §1101.455 of the Act and this section and must be substantially similar to the legal courses disseminated and updated by the Commission.

(2) The course was certified by a distance learning certification center that is acceptable to the commission.

(3) An approved instructor or the provider's coordinator/director graded the written course work.

(4) The provider:

(A) ensured that a qualified person was available to answer students' questions or provide assistance as necessary;

(B) certified students as successfully completing the course only if the student:

(i) completed all instructional modules required to demonstrate mastery of the material;

(ii) attended any hours of live instruction and/or testing required for a given course; and

(iii) passed either:

(I) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(II) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks credit; and

(III) provided the students with the same materials given to students who attend the same course by live instruction.

(aa) Supervised Video Instruction for elective course credit. A provider may register a course under subsection (q) of this section to be taught by supervised video instruction if:

(1) the provider complies with §535.72 of this chapter when offering and advertising the course and when completing rosters and retaining records;

(2) a proctor is present during the time the video is shown; and

(3) the provider discloses in any advertisement for the course that the instruction will be by supervised video instruction.

(bb) Supervised Video Instruction for required legal course credit. A provider may register a course under subsection (r) of this section to be taught by supervised video instruction if the provider:

(1) complies with subsection (aa)(1) - (3) of this section;

(2) ensures that a certified instructor is available to answer students' questions or provide assistance as necessary; and

(3) ensures that students receiving MCE credit for the course passed a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider.

(cc) An applicant must submit an MCE Course Application Supplement to seek approval to offer an MCE distance learning required legal course and receive written acknowledgment from the commission prior to offering the course.

(dd) For a distance learning course, an online course will not be considered complete until credit is awarded by the provider. The provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes the course requirements for credit. The provider shall report the awarding of credit to the commission either by filing a completed Alternative Instructional Methods Reporting Form, signed by the student, or submitting the information contained in the form by electronic means acceptable to the commission.

(ee) A provider may use as guest speakers persons who have not been approved as instructors, provided that no more than a total of 50% of the course is taught by the unapproved persons for a registered MCE elective credit course. The commission-registered instructor must remain in the classroom during the guest speaker's presentation.

(ff) A provider may use guest speakers who have not been approved as instructors to conduct a registered MCE elective credit course if:

(1) the provider is an accredited college or university or a professional trade association; and

(2) the course is supervised and coordinated by a commission-approved instructor who is responsible for verifying the attendance of all who request MCE credit.

§535.72. Presentation of Courses, Advertising and Records.

(a) Course completion roster. A provider offering each MCE course shall file an MCE Course Completion Roster with the commission within 10 days following completion of the course for licensees who have attended the entire course registered with the commission.

Course completion rosters may be transmitted for filing by facsimile machine. The roster shall be signed by an authorized representative of the provider who was in attendance and for whom an authorized signature exemplar is on file with the commission or the instructor for the course. Providers are responsible for the security of the course completion rosters. The commission may not accept signature stamps or unsigned forms. Providers must make every reasonable effort to ensure that no student is certified for full MCE credit who has not attended all class sessions.

(b) Partial credit.

(1) A provider may, but is not required, to permit a student to claim partial credit for a course if:

(A) the course is approved for elective credit only;

(B) the course is not a distance learning course;

(C) the student attends less than the complete number of hours in the course;

(D) the student, by completing an MCE Partial Credit Request Form, requests credit only for the hours the student completed and the student does not claim credit for an hour that the student did not attend in its entirety except as provided by subsection (c) of this section;

(E) the provider signs the MCE Partial Credit Request Form as evidence that the provider has no reason to believe the amount of credit claimed is inaccurate;

(F) the provider submits the MCE Partial Credit Request Form to the commission within the time required to submit the course completion roster under subsection (a) of this section.

(2) Partial credit may not be granted for any course that contains as part of its curriculum all or part of the six legal hours of mandatory continuing education required by §1101.455 of the Act.

(c) Attendance. While a provider is expected to ensure that each student is present in the classroom for the hours of time for which credit is awarded, this section is not intended to penalize students who must leave the classroom for brief periods of time for personal reasons. Providers shall make every reasonable effort to ensure that no student is given course credit if the student persists in disrupting the orderly conduct of a class after being cautioned by the provider or the instructor to cease disruptive behavior. Providers may not use students for administration or monitoring duties during the course if the use prevents the student's participation in a significant portion of the course.

(d) Proof of distance learning course completion. In a distance learning course, the provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes course requirements for credit. The provider shall report the awarding of credit to the commission. Course credit must be reported either by the provider filing a completed Alternative Instructional Methods Reporting Form signed by the student, or submitting the information contained in the form by electronic means acceptable to the commission. If the provider chooses to use an electronic reporting process, the process must ensure that only students who complete the course are reported to the commission as receiving course credit and that the process does not compromise the security of commission records.

(e) Pre-course announcements. A provider shall, prior to commencement of a course, announce that the provider will not certify a student for full MCE credit unless the student attends all sessions of the course, that no makeups or written work will be allowed for MCE credit, that students may evaluate the course and instructor by downloading an evaluation form from the TREC web site and submitting the form electronically or by mail, and that the student must determine if the course is timely and appropriate for the student's MCE requirement. If the provider accepts partial credit for partial attendance at an elective credit course, the provider shall explain the procedure for granting partial credit. If the provider has not advertised or otherwise made students aware of the provider's refund policy, the pre-course announcement must also contain the refund policy. The provider may allow a ten-minute break for every 50 minutes of session time, but a break must be given at least every two hours, using all accumulated break time, and the daily course presentation may not exceed ten hours.

(f) Facilities. Facilities used by providers for classroom presentations must be adequate to accommodate students. Providers shall ensure each student has seating, a writing surface and writing materials. Rigid tablets or clipboards may be provided as a writing surface. For a classroom course, the provider must offer the course in a location conducive to instruction that is separate and apart from the work area, such as a classroom, training room, conference room, or assembly hall.

(g) Course materials. Providers must furnish students with copies, for students' permanent use, of any material which is the basis for a significant portion of the course. Providers offering any of the required legal courses must provide the students with the materials identified as student course materials for the required legal courses. The course materials provided to the students may be in printed form or electronic media such as a CD-ROM or diskette that the student may access through commonly available software such as common word-processing programs and slide presentation programs. Ample space must be provided on handouts for note taking or completion of any written exercises. If a provider charges fees for supplies, materials, or books needed in course work, the fees must be itemized in a written statement provided to each student by the provider before the student registers for the course.

(h) Open enrollment. All MCE courses must be open to enrollment by the general public. Providers may give preference in enrollment to persons who need MCE credit to obtain, renew or activate a license and may enroll all others on a space available basis.

(i) Instructor and Course Evaluations. A provider shall make available instructor and course evaluation forms for completion by students in every course. The forms shall, at a minimum, contain evaluation criteria approved by the commission. The school shall file in the school records any comments by the school's management relevant to instructor or course evaluations. On demand by the commission the school shall produce instructor and course evaluation forms for inspection.

(j) Advertising. Advertising of MCE shall be subject to the following conditions.

(1) A provider applicant may not advertise a specific MCE course or represent in advertising that the applicant is a provider until the applicant has received written approval from the commission for the providership and registered at least one course. A provider applicant may advertise an intention to offer MCE courses if no specific course is described and the advertisement clearly indicates the applicant has not been approved as a provider.

(2) A provider may not advertise a course as acceptable for MCE credit until the provider has received written acknowledgment of registration of the course. A provider may advertise that approval of the course for MCE credit is pending provided that an application has been submitted to the commission and is awaiting approval.

(3) A provider may not offer a course until the provider has received written acknowledgment of registration of the course.

(4) Any advertisement or promotional material used by a provider must indicate the MCE provider's name or assumed business name as reflected in the commission's records and the MCE provider number assigned by the commission. The advertisement or promotional material also must include the specific MCE course numbers and course titles or a statement that MCE course numbers and titles are available from the provider; or, if approval of the course is pending, the course title and a statement that MCE approval is pending. When a provider offers a course that is hosted by another person or organization, the advertisement or promotional material must show clearly that the approved MCE provider is offering the course.

(5) A provider may not publish advertisements which are misleading or which are likely to deceive the public.

(6) Any name a provider uses in advertising must not be deceptively similar to the name of any other approved MCE provider or school accredited by the commission or falsely imply a governmental relationship.

(7) Any written advertisement which contains a fee charged by the provider shall display all fees for the course in the same place in the advertisement and with the same degree of prominence. If a provider requires students to purchase course materials which are not included in the tuition, any such fees must appear in the advertisement of the course.

(k) Record retention. A provider shall maintain the same types of records and for the same period of time as required of schools accredited under Subchapter F of this chapter (relating to Pre-License Education and Examination). Providers shall make copies of the records available to former students. A provider may charge a reasonable fee to defray the cost of copying student records. A provider's records must be kept at the location designated in the MCE Provider Application. Providers must obtain prior approval from the commission to change the location at which the provider's records are kept.

(l) Course administration. Providers of MCE courses are responsible to the commission for the conduct and administration of each course presentation, the punctuality of classroom sessions, verification of student attendance, and instructor performance. Providers shall ensure that the required legal courses are administered by instructors in substantially the same manner as disseminated and updated by the commission. During the presentation of a course, providers may not promote the sale of goods or services.

(m) Updates. If the commission determines that it is in the public interest to update the required legal courses about changes in the law, the commission may require the provider to furnish each student with a copy of the information. The commission also may require the provider to ensure that the provider's instructors include the material in the presentation of the course. The commission shall furnish the provider with a copy of the information and notify the provider that the commission requires compliance with this subsection in a required legal course or any elective course combined with a legal course offered after the provider's receipt of the notice.

(n) Change in ownership. In the event of a change of ownership, the provider must obtain approval from the commission prior to the change, and proposed new owners shall submit a Principal Information Form. Providers shall report a change in business name, street or mailing address, email address, person responsible for records or day-to-day operations, or persons authorized to sign MCE forms at least 15 days prior to the desired date of change. Providers shall report any change in refund policy, attorney-in-fact, address of attorney-in-fact or business telephone number as the change occurs.

(o) MCE credit for instructors. Providers may request MCE credit be given to instructors of MCE courses subject to the following guidelines.

(1) The instructors may receive credit for only those portions of the course that they teach by filing a completed Instructor Credit Request.

(2) The instructors may receive full course credit by attending all of the remainder of the course and signing the course completion roster.

(p) Written policies. Each provider shall establish written policies governing refunds and contingency plans in the event of course cancellation. If the provider cancels a course, the provider shall fully refund all fees collected from students, or at the student's option, the provider may credit the student for another course of equal or greater credit hours.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

SUBCHAPTER I. LICENSES

22 TAC §§535.91, 535.92, 535.94, 535.96

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.91, regarding Renewal Notices; §535.92, regarding Renewal: Time for Filing; Satisfaction of Mandatory Continuing Requirements; §535.94, regarding Hearing on Application Disapproval: Probationary Licenses; and new §535.96, regarding Mailing Address and Other Contact Information, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8263) and will not be republished.

TREC is simultaneously adopting the amendments and new rule as part of a comprehensive rule review of 22 TAC Chapter 535.

Section 535.91 is amended to make it consistent with other provisions; parts of subsection (c) are deleted and moved to new §535.96; new subsection (e) is moved from §535.92(m). Section 535.92 is amended to provide consistency with other provisions of the chapter; new subsection (e) is moved from §535.63(c). Section 535.94 is amended to provide consistency with other provisions of the chapter; new subsection (d) clarifies that if a person who has a probationary license renews the license within the one-year late renewal period, the new license is subject to the remaining probationary period from the previous probationary license. New §535.96 regarding Mailing Address and Other Contact Information is moved from §535.91; the new section requires licensees to notify the commission of the licensee's email address.

Generally speaking, the amendments and new rule correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the rule adoption is more streamlined, consistent and readable rules.

No comments were received on the rules as proposed.

The amendments and new rule are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. TERMINATION OF SALESPERSON'S ASSOCIATION WITH SPONSORING BROKER

22 TAC §§535.121 - 535.123

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.121, regarding Inactive License; §535.122, regarding Reactivation of License; and §535.123, regarding Inactive Broker Status, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8266) and will not be republished.

TREC is simultaneously adopting the amendments as part of a comprehensive rule review of 22 TAC Chapter 535.

Section 535.121 is amended to clarify that a salesperson's license goes inactive if a broker notifies the commission in writing that the broker is terminating sponsorship of the broker. Subsections (b) and (c) are rewritten for clarity. Section 535.122 is changed to maintain consistency with statutory references and defined terms. Section 535.123 is changed to maintain consistency with statutory references and defined terms; an inactive broker is required to notify the commission if the broker wishes to go on inactive status and provide the commission with information including the broker's telephone number and email address.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rules as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER M. NONRESIDENTS

22 TAC §535.131, §535.132

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.131, regarding Unlawful Conduct; Splitting Fees; and §535.132, regarding Eligibility of Licensure, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8267) and will not be republished.

Section 535.131 is amended to delete subsections (b) - (d) as the subjects are otherwise covered in definitions under §535.1 or in new §535.4, regarding License Required. Section 535.132 is amended to delete the definition for "state" which was moved to §535.1. TREC is simultaneously adopting the amendments as part of a comprehensive rule review of 22 TAC Chapter 535.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rules as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. SUSPENSION AND REVOCATION OF LICENSURE

22 TAC §§535.141, 535.143 - 535.149, 535.153, 535.159 - 535.161

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.141, regarding Initiation of Investigation; §535.143, regarding Fraudulent Procurement of License; §535.144, regarding When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child; §535.145, regarding False Promise; §535.146, regarding Failure to Properly Account for Money; Commingling; §535.147, regarding Splitting Fee with Unlicensed Person; §535.148, regarding Receiving an Undisclosed Commission or Rebate; §535.149, regarding Lottery or Deceptive Trade Practice; §535.153, regarding Violating an Exclusive Agency; §535.159, regarding Failing to Properly Deposit Escrow Monies; §535.160, regarding Failing to Properly Disburse Escrow Money; and §535.161, regarding Failing to Provide Information. Section 535.148 is adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8268) and will be republished. Sections 535.141, 535.143 - 535.147, 535.149, 535.153, and 535.159 - 535.161 are adopted without changes to the proposed text and will not be republished.

Section 535.148(e) was changed to add an effective date for that subsection of March 1, 2011. The form adopted by reference in §535.148(f) was also changed to remove the phrase "to buyers and sellers of real estate" from the paragraph which discloses the receipt of compensation from a residential service company. The revisions to the rule as adopted do not change the nature or scope so much that it could be deemed a different rule. The rule as adopted does not affect individuals other than those contemplated by the rule as proposed. The rule as adopted does not impose more onerous requirements than the proposed version and does not materially alter the issues raised in the proposed rule. The changes in the rule reflects a nonsubstantive variation from the proposed rule to make the affected rule consistent with other rules.

The amendments to §535.141 streamline the section, update the cites and clarify existing subsections; subsection (h) is amended to include advertising in the laundry list activities that a licensee may not engage in while the person's license is under suspension; subsection (i)(3) and (4) is added to include home inspectors; subsection (j) is added to address matters relating to automatic suspension of a license for violating a term or condition of an agreed probated revocation or suspension.

The amendments to §535.144 clarify that a licensee must disclose the information required by §1101.652(a)(3) in writing.

The amendments to §535.146 clarify existing requirements that apply to maintenance of trust accounts, including that a broker is ultimately responsible for compliance with the trust account requirements in the Act and Rules; subsection (h) is amended to require a broker to notify all parties in writing when a broker makes a disbursement to which all parties have not expressly agreed in writing; and subsection (k) is amended to clarify that a broker may deposit and maintain additional amounts in a trust account to cover bank service fees.

Section 535.147(a) is deleted and moved to the definitions in §535.1; new subsection (a) clarifies that a licensee may not share a commission with an unlicensed person except as provided by the Act or Rules; new subsection (b) authorizes an unlicensed person to share in the income earned by a licensee as long as the person does not engage in real estate brokerage activity; and new subsection (c) clarifies that a broker or salesperson may not share a commission with an unlicensed corporation or limited liability company created by a licensee for the purpose of collecting a commission or fees on behalf of the licensee.

New subsection (c) is added to §535.148 to prohibit a licensee from entering into contracts with service providers which prohibits a licensee from entering into or offering similar service on behalf of a competing service provider; new subsection (d) prohibits contingent fee arrangements where the licensee accepts a fee that is contingent upon a party purchasing a contract or services from a specific service provider; new subsection (e) adopts by a reference RSC-1, Disclosure of Relationship with Residential Service Company, which licensees are required to use as of March 1, 2010 to disclose compensation for services provided to or on behalf of a residential service company.

The amendments to §535.149 clarify the definition of "lottery" and "deceptive trade practices."

Amendments to §§535.143, 535.145, 535.153, and 535.159 - 535.161 clarify and streamline existing provisions.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

Additional justification is provided below in response to the comments on the advertising rules as proposed.

The Texas Association of Realtors, the Texas Apartment Association, and the Metrotex Association of Realtors commented on the rules proposed under Subchapter N.

The commission received 86 comments on the rules as proposed

Comments: Two commenters commented in favor of §535.146 as proposed.

Comments: Approximately 82 comments expressed concerns about the costs and burden of complying with §535.154 as proposed.

Comment: One commenter noted that the requirements of subsection (d) of §535.154 are also overly burdensome because it places potential liability on a licensee for inadvertent advertising inaccuracies.

Comment: One commenter suggested that adding the broker's license number to advertisements and requiring the broker's name to be identified in a clear and conspicuous manner will potentially clutter advertisements making them harder to read by the general public.

Response: The commission will continue to seek recommendations from interested parties regarding proposed new §535.154, and therefore did not take final action to adopt proposed new §535.154. Similarly, the commission decided not to take final action to repeal existing §535.154 until such time that a decision is made on a provision to replace it.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.148. Receiving an Undisclosed Commission or Rebate.

(a) A licensee may not receive a commission, rebate, or fee in a transaction from a person other than the person the licensee represents without first disclosing to the licensee's client that the licensee intends to receive the commission, rebate or fee, and obtaining the consent of the licensee's client. This subsection does not apply to referral fees paid by one licensed real estate broker or salesperson to another licensed broker or salesperson.

(b) If a party the licensee does not represent agrees to pay a service provider in the transaction, the licensee must also obtain the consent of that party to accept a fee, commission or rebate from the service provider. As used in this section, the term "service provider" does not include a person acting in the capacity of a real estate broker or salesperson.

(c) A licensee may not enter into a contract or agreement with a service provider to a real estate transaction in which the licensee represents one or both of the parties if, pursuant to the contract or agreement:

(1) the licensee provides services for or on behalf of the service provider; and

(2) the contract or agreement prohibits the licensee from offering similar services for or on behalf of a competing service provider.

(d) A licensee may not accept a fee or payment for services provided for or on behalf of a service provider to a real estate transaction the payment of which is contingent upon a party to the real estate transaction purchasing a contract or services from the service provider.

(e) Effective March 1, 2011, a licensee must use TREC Form RSC-1, Disclosure of Relationship with Residential Service Company, to disclose to a party to a real estate transaction in which the licensee represents one or both of the parties any payments received for services provided for or on behalf of a residential service company licensed under Texas Occupations Code Chapter 1303.

(f) The Texas Real Estate Commission adopts by reference TREC Form No. RSC-1, Disclosure of Relationship with Residential Service Company, approved by the commission for use by licensees to disclose payments received from a resident service company. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. HEARING ON SUSPENSION OR REVOCATION OF LICENSURE

22 TAC §535.171

The Texas Real Estate Commission (TREC or the commission) adopts an amendment to §535.171, regarding Hearing: Subpoenas and Fees, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8273) and will not be republished.

New subsection (c) addresses cases in which a party requests issuance of a subpoena and requires the party to pay for the costs of issuing the subpoena.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER P. PENALTY FOR UNLICENSED ACTIVITY

22 TAC §535.181

The Texas Real Estate Commission (TREC or the commission) adopts an amendment to §535.181, regarding Penalty without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8274) and will not be republished.

Section 535.181 is amended to clarify that the commission may, in addition to the existing powers, impose an administrative penalty and issue an order to cease and desist.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

The Texas Association of Realtors commented on the rules as proposed.

The commission received two favorable comments on the §535.181 as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

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SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission (TREC or the commission) adopts an amendment to §535.191, regarding Schedule of Administrative Penalties without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8274) and will not be republished.

Section 535.191 is amended to add additional provisions that apply to the schedule.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §§535.201, 535.206, 535.209, 535.212 - 535.218, 535.221, 535.222, 535.226

The Texas Real Estate Commission (TREC or the commission) adopts new §535.201, regarding Definitions; §535.209, regarding Examinations; §535.212, regarding Education and Experience Requirements for a License; §535.213, regarding Approval of Courses in Real Estate Inspection; §535.214, regarding Providers of Real Estate Inspections Courses; and §535.217, regarding Contact Information; and amendments to §535.206, regarding The Texas Real Estate Inspector Committee; §535.215, regarding Inactive Inspector Status; §535.216, regarding Renewal of License or Registration; §535.218, regarding Continuing Education, §535.221, regarding Advertisements; §535.222, regarding Inspection Reports; and §535.226, regarding Sponsorship of Apprentice Inspectors and Real Estate Inspectors. Section 535.212 and §535.218 are adopted with

changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8275) and will be republished. Sections 535.201, 535.206, 535.209, 535.213 - 535.217, 535.221, 535.222, and 535.226 are adopted without changes to the proposed text and will not be republished.

The changes to the proposed text of §535.212 establish an effective date of September 1, 2011, for the apportioning of pre-licensure hours, and the change to §535.218 establishes an effective date of September 1, 2011, for the 6-hour Standards of Practice/Legal/Ethics Update course. The revision to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed version and do not materially alter the issues raised in the proposed rules. Changes in the adopted rules will give applicants, licensees, and education providers additional time to accommodate these changes through modified course offerings.

The new rules and amendments to these sections reflect a nonsubstantive reorganization of 22 TAC Chapter 535, Subchapter R, to improve readability of the rules based on changes identified through the agency's rule review process. Other provisions throughout the rules modify language to allow the agency and its licensees to better take advantage of opportunities for online license management, as well as electronic delivery of notices and license certificates. In addition to these nonsubstantive amendments, a number of substantive changes are being adopted.

New §535.201, Definitions, consolidates definitions related to regulation of inspectors, including code organization and trade association, and introduces a Texas Standards of Practice/Legal/Ethics Update course.

Amendments to §535.206, The Texas Real Estate Inspector Committee, clarify that a member only serves until a successor has been appointed if the member completes his or her term and make other nonsubstantive changes to the section.

New §535.209, Examinations, moves the examination provisions from §535.214 (proposed for repeal) and lowers the minimum passing score on the professional inspector examination from 80% to 75%.

New §535.212, Education and Experience Requirements for a License, allocates the numbers of hours of education required by Chapter 1102 for licensure as a real estate inspector or professional inspector among the core subject matter areas. This change addresses both the hours required under the traditional three-tier method of licensure, as well as the hours required for the education/experience substitute method.

New §535.213, Approval of Courses in Real Estate Inspection, increases the maximum amount of classroom course time that may be spent on field work from 10% to 50% and defines a core course area of "legal/ethics."

New §535.214, Providers of Real Estate Inspection Courses, incorporates content from current §535.212 regarding the requirements for providers of courses in real estate inspection.

Amendments to §535.215, Inactive Inspector Status, reflect a change in requirements regarding inactive and active status to better take advantage of opportunities for online license management.

Amendments to §535.216, Renewal of License or Registration, reflect the commission's move toward online filing of applications and related forms, as well as electronic delivery of notices. The amendments also change the title of the section from "Renewal of License or Registration" to "Renewal of License."

New §535.217, Contact Information, requires that licensees provide the commission with a phone number and email address in addition to the permanent mailing address that is currently required, and further requires licensees to keep the commission apprised of any changes to this contact information.

Amendments to §535.218, Continuing Education, require all real estate inspectors and professional inspectors to take a six-hour Texas Standards of Practice/Legal/Ethics Update course in order to renew a license. This requirement does not increase the total number of hours required to renew but will be counted toward the 32-hour requirement to renew a two-year license.

Amendments to §535.221, Advertisements, explicitly brings electronic social media used for the purpose of gaining business into the definition of "advertisements" and clarifies how the rules relating to inspector advertising apply to these types of advertisements and how inspectors must identify themselves and provide their license numbers on such advertisements.

Amendments to §535.222, Inspection Reports, clarify that the names of each inspector who participated in performing an inspection, as well as all supervising real estate inspectors and/or sponsoring professional inspectors, must appear on inspection reports. The amendments also eliminate the signature requirement on inspection reports and require inspectors to deliver reports within three days unless otherwise agreed to in writing.

Amendments to §535.226, Sponsorship of Apprentice Inspectors and Real Estate Inspectors, reflect the move toward online license management and also eliminate language requiring signatures on inspection reports.

The reasoned justification for the amendments and new rules is greater availability of members willing to serve on the Inspector Committee; greater availability of inspectors with a broader base of understanding of inspection principles; increased clarity regarding the requirements for inspector advertising, report identification, and delivery of reports; and improved efficiency within the agency.

The Commission has received four comments regarding the amendments as proposed. Regarding §535.209, three commenters wrote in opposition to the reduction in the minimum passing score on the professional inspector examination, stating that reducing the minimum passing score from 80% to 75% constituted a "dumbing down" of the profession and that such a reduction would allow more inspectors and "incapable people" into the profession. The Commission respectfully disagrees, as the current passage rate of below 40% is substantially lower than passage rates on most other occupational licensing exams; lowering the minimum score to 75% is expected to bring the passage rate to approximately 60-65 percent, which is more consistent with passage rates of other occupational licensing examinations.

One of the commenters also stated his opposition to the proposed requirement that all real estate inspectors and professional inspectors take six hours of Standards of Practice/Legal/Ethics Update, applicable toward the 32-hour continuing education requirement, for renewal. This commenter acknowledged the need for such education but objected to the six-hour

requirement and suggested that the Commission: (a) create a free course that inspectors would be required to take in addition to the 32-hour requirement; or (b) require licensees to sign a certification upon each renewal stating that they have read and are familiar with current Standards of Practice, laws, and rules. The Commission appreciates this commenter's position and suggestions but does not have authority to require continuing education beyond the 32 hours (16 per year) required for renewal and respectfully disagrees that signing a statement upon renewal is as effective as requiring coursework to ensure that inspectors are duly educated about the Standards of Practice and laws and rules applicable to them.

The fourth commenter expressed concern that requiring every inspector who participated in an inspection to sign the report would cause confusion and could result in the demise of multi-inspection teams and, in turn, the benefits thereof. The commission believes that the value of clearly stating who participated in an inspection outweighs any potential drawbacks.

The amendments and new rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statute affected by this adoption is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the adoption.

§535.212. Education and Experience Requirements for a License.

(a) To become licensed as a real estate inspector or professional inspector, a person must satisfy:

(1) the education and experience requirements outlined in §1102.108 and §1102.109 of Chapter 1102; or

(2) the substitute education and experience requirements established by the commission pursuant to §1102.111.

(b) Effective September 1, 2011, a person may satisfy the 90-hour education requirement for licensure as a real estate inspector pursuant to subsection (a)(1) of this section by completing the following coursework:

(1) 10 hours in foundations;

(2) 8 hours in framing;

(3) 10 hours in building enclosure;

(4) 10 hours in roof systems;

(5) 8 hours in plumbing systems;

(6) 10 hours in electrical systems;

(7) 10 hours in heating, ventilation, and air conditioning systems;

(8) 8 hours in appliances;

(9) 4 hours in Texas Standards of Practice;

(10) 4 hours in Texas Standard Report Form/Report Writing; and

(11) 8 hours in Texas Legal/Ethics.

(c) Effective September 1, 2011, a person may satisfy the 128-hour education requirement for licensure as a professional inspector pursuant to subsection (a)(1) of this section by completing the following coursework:

(1) the courses required for licensure as a real estate inspector in subsection (b) of this section;

(2) 8 additional hours in Texas Standard Report Form/Report Writing;

(3) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(4) 24 additional hours in any core inspection subject(s).

(d) For the purpose of measuring the number of inspections required to receive a license or to sponsor apprentice inspectors or real estate inspectors, the commission considers an improvement to real property to be any unit capable of being separately rented, leased or sold. Subject to the following restrictions, an inspection of an improvement to real property that includes the structural and equipment/systems of the unit constitutes a single inspection.

(1) Half credit will be given for an inspection limited to structural components only or to equipment/systems only.

(2) No more than 80% of the inspections for which experience credit is given may be limited to structural components only or to equipment/systems components only.

(3) A report addressing two or more improvements is considered a single inspection.

(4) The commission may not give experience credit to the same applicant or professional inspector for more than three complete or six partial inspections per day. No more than three applicants may receive credit for the inspection of the same unit within a 30 day period, and no more than three apprentice inspectors may receive credit for an inspection of the same unit on the same day.

(e) For the purpose of satisfying any requirement that an applicant hold a license for a period of time in order to be eligible for a license as a real estate inspector or professional inspector, the commission shall not give credit for periods in which a license was on inactive status. An applicant for a real estate inspector license must have been licensed on active status for a total of at least three months within the 12 month period prior to the filing of the application. An applicant for a professional inspector license must have been licensed on active status for a total of at least 12 months within the 24 month period prior to the filing of the application.

(f) Substitute requirements for a real estate inspector license. A person may satisfy the substitute education and experience requirements to become licensed as a real estate inspector as follows:

(1) A person who does not have two years of experience as an architect, engineer, or engineer-in-training must:

(A) complete a total of 120 hours of core inspection coursework. Effective September 1, 2011, these hours must include the following:

(i) 90 hours of coursework as outlined in subsection (b) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing;

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(iv) 16 additional hours in any core inspection subject(s); and

(B) satisfy the substitute experience requirement by:

(i) completing 60 hours of an approved interactive experience training module presented by a licensed professional inspector and submitting a certificate of completion;

(ii) accompanying a licensed professional inspector eligible to sponsor for 60 hours of inspections and submitting a letter from the professional inspector certifying that the applicant attended 60 hours of such training; or

(iii) having three years of personal experience in a field directly related to home inspection, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property and providing two affidavits from persons who have personal knowledge of the applicant's work, detailing the time and nature of the applicant's relevant experience.

(2) A person who has at least two years of experience as an active practicing licensed or registered architect, professional engineer, or engineer-in-training must:

(A) complete a total of 104 hours of core inspection coursework. Effective September 1, 2011, these hours must include the following:

(i) 90 hours of coursework as outlined in subsection (b) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing; and

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(B) submit a license history from the regulatory agency that issued the license or registration documenting the period of practice as a licensed or registered architect, professional engineer, or engineer-in-training.

(g) Substitute requirements for a professional inspector license. A person may satisfy the substitute education and experience requirements to become licensed as a professional inspector as follows:

(1) A person who does not have three years of experience as an architect, engineer, or engineer-in-training must:

(A) complete a total of 328 hours of core inspection coursework. Effective September 1, 2011, these hours must include the following:

(i) 128 hours of coursework as outlined in subsection (c) of this section;

(ii) 30 additional hours in foundations;

(iii) 30 additional hours in framing;

(iv) 12 additional hours in building enclosure;

(v) 25 additional hours in roof systems;

(vi) 25 additional hours in plumbing systems;

(vii) 25 additional hours in electrical systems;

(viii) 25 additional hours in heating, ventilation, and air conditioning systems;

(ix) 6 additional hours in appliances;

(x) 8 additional hours in Standards of Practice/Legal/Ethics;

(xi) 8 additional hours in Standard Report Form/Report Writing; and

(xii) 6 additional hours in any core inspection subject(s); and

(B) satisfy the substitute experience requirement by:

(i) completing 120 hours of an approved interactive experience training module presented by a licensed professional inspector and submitting a certificate of completion;

(ii) accompanying a licensed professional inspector eligible to sponsor for 120 hours of inspections and submitting a letter from the professional inspector certifying that the applicant attended 120 hours of such training; or

(iii) having five years of personal experience in a field directly related to home inspection, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property, and providing two affidavits from persons who have personal knowledge of the applicant's work, detailing the time and nature of the applicant's relevant experience.

(2) A person who has at least three years of experience as an active practicing licensed or registered architect, professional engineer, or engineer-in-training must:

(A) complete a total of 142 hours of core inspection coursework. Effective September 1, 2011, these hours must include the following:

(i) 128 hours of coursework as outlined in subsection (c) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing; and

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(B) submit a license history from the regulatory agency that issued the license or registration documenting the period of practice as a licensed or registered architect, professional engineer, or engineer-in-training.

(h) Not more than two persons may accompany a licensed professional inspector on any inspection used to meet the experience requirement of §1102.111(a) of Chapter 1102.

§535.218. Continuing Education.

(a) Effective September 1, 2011, continuing education for renewal of a real estate inspector or professional inspector license must include six hours of Texas Standards of Practice/Legal/Ethics Update.

(b) Except as provided by this section, real estate inspection courses submitted by professional inspectors or real estate inspectors to satisfy the requirements of §1102.205 of Chapter 1102 for continuing education must qualify for core inspection credit under §535.212 of this title (relating to Education and Experience Requirements for a License).

(c) In addition to the core real estate inspection courses defined in §1102.001(5) of Chapter 1102 and §535.212 of this title, the commission also will accept a course related to wood-destroying insects, radon, asbestos, lead, or other hazardous substances to satisfy continuing education requirements.

(d) Courses submitted for continuing education credit must be successfully completed during the term of the current license. The

commission may not grant continuing education credit twice for the same course taken by a licensee within a 2-year period.

(e) Other than for correspondence courses or courses offered by alternative delivery methods, such as by computer, completion of a final examination is not required for a licensee to obtain continuing education credit for a course.

(f) A professional inspector or real estate inspector who fails to renew a license that is subject to continuing education requirements and who files an application for renewal within one year after the previous license has expired must provide evidence satisfactory to the commission that the applicant has completed any continuing education that would have been required for timely renewal of the previous license. Continuing education courses submitted toward renewal of a license must have been completed during the license period.

(g) Licensed professional inspectors, real estate inspectors and apprentice inspectors may renew a license on inactive status. Inspectors are not required to complete continuing education courses as a condition of renewing a license on inactive status but must satisfy continuing education requirements before returning to active status.

(h) Providers may request continuing education credit be given to instructors of core real estate inspection courses subject to the following guidelines.

(1) The instructors may receive credit for only those portions of the course which they teach.

(2) The instructors may receive full course credit by attending all of the remainder of the course.

(i) The commission will not grant partial credit to an inspector who attends a portion of a course.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §§535.212 - 535.214

The Texas Real Estate Commission (TREC or the commission) adopts the repeal of §535.212, regarding Education and Experience Requirements for an Inspector License; §535.213, regarding Schools and Courses of Study in Real Estate Inspection; and §535.214, regarding Examinations, without changes to the proposal as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8283).

The repeal of these provisions reflects a nonsubstantive reorganization of 22 TAC Chapter 535, Subchapter R, to improve readability of the rules based on changes identified through the agency's rule review process. Other provisions throughout the rules modify language to allow the agency and its licensees to better take advantage of opportunities for online license management, as well as electronic delivery of notices and license certificates.

Section 535.212, Education and Experience Requirements for an Inspector License, is repealed and new §535.212, Education and Experience Requirements for a License, adopted elsewhere in this issue, reorganizes the provisions of the section and allocates the number of hours of education required by Chapter 1102 for licensure as a real estate inspector or professional inspector among the core subject matter areas.

Section 535.213, Schools and Courses of Study in Real Estate Inspection, is repealed and new §535.213, Approval of Courses in Real Estate Inspection, adopted elsewhere in this issue, reorganizes the provisions of the section and increases the maximum amount of classroom course time that may be spent on field work from 10% to 50% and further defines a core course area of "legal/ethics."

Section 535.214 is repealed as a part of a reorganization of the rules resulting from the agency's rule review process. The Examinations section of the rules regarding inspectors is being adopted elsewhere in this issue as new §535.209.

The reasoned justification for the repeals is improved clarity and readability of the rules regarding inspectors.

No comments were received regarding the repeals as proposed.

The repeals are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statute affected by these repeals is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007031
Devon V. Bijansky
Deputy General Counsel
Texas Real Estate Commission
Effective date: January 1, 2011
Proposal publication date: September 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER S. RESIDENTIAL RENTAL LOCATORS

22 TAC §535.300

The Texas Real Estate Commission (TREC or the commission) adopts an amendment to §535.300, regarding Advertising by Residential Rental Locators, without changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8284) and will not be republished.

Section 535.300 is amended to clarify that the definition of "advertisement" in §535.154 applies to rental locators.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

No comments were received on the rule as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006922
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: January 1, 2011
Proposal publication date: September 10, 2010
For further information, please call: (512) 465-3926

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CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.20, 537.28, 537.30 - 537.32, 537.37, 537.43, 537.47

The Texas Real Estate Commission (TREC) adopts amendments to 22 TAC §537.20, regarding Standard Contract Form TREC No. 9-8, Unimproved Property Contract; §537.28, regarding Standard Contract Form TREC No. 20-9, One to Four Family Residential Contract (Resale); §537.30, regarding Standard Contract Form TREC No. 23-10, New Home Contract (Incomplete Construction); §537.31, regarding Standard Contract Form TREC No. 24-10, New Home Contract (Completed Construction); §537.32, regarding Standard Contract Form TREC No. 25-7, Farm and Ranch Contract; §537.37, regarding Standard Contract Form TREC No. 30-8, Residential Condominium Contract (Resale); §537.43, regarding Standard Contract Form TREC No. 36-6, Addendum for Property Subject to Mandatory Membership in a Property Owners Association; and §537.47, regarding Standard Contract Form TREC No. 40-4 Third Party Financing Condition Addendum for Credit Approval, with changes to the proposed text and to the forms adopted by reference as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8284). The amendments adopt by reference eight revised contracts for use by Texas real estate licensees.

The difference between the rules and forms as proposed and those adopted are as follows: the proposed new §537.53, regarding Standard Contract form No. 46-0 entitled Non-Realty Items Addenda is not adopted; the title of form No. 40-4 is changed to Third Party Financing Addendum for Credit Approval; references to the title of form No. 40-4 are changed in all relevant forms; the reference to "affidavit" in paragraph 6.C.(1) of all relevant forms is changed to "T-47 Affidavit;" proposed 6.C.(4) "No survey required" is deleted from all relevant forms, except the Farm and Ranch Contract; paragraph 6.E.(2) in all relevant forms is amended to provide notice that the property may be subject to more than one property owners associations if applicable; "if any" is deleted from paragraph 7.D.(2) in all relevant forms; paragraph 15.B in all relevant forms is changed to provide for waiver of buyer's or seller's right to enforce specific performance if the party fails to file a petition for such and provide notice to the escrow agent within 45 days of the closing date; paragraph 22 of all relevant forms is corrected for typographical errors; conforming title changes to relevant forms and to delete the reference to the non-realty items addendum are made; the reference to "broker or designee" on page eight of all relevant forms is changed to "licensed supervisor of associate;" paragraph A.2 of Addendum for Property Subject to Mandatory Membership in a Property Owners Association is rewritten for additional clarification.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.20 adopts by reference Standard Contract Form TREC No. 9-8, Unimproved Property Contract. The adopted revisions are the same as those adopted for Form TREC No. 20-9 as described below, except for paragraph 2.

The amendment to §537.28 adopts by reference Standard Contract Form TREC No. 20-9, One to Four Family Residential Contract (Resale). Paragraph 2.B. is revised to include mounts and brackets for televisions and speakers; the phrase regarding controls in paragraph 2.C. is rewritten and placed at the end of the list of accessories. Paragraph 4.A.(1) is amended to provide examples of underwriting examples to include appraisal, insurability, and lender required repairs; the termination provision under this paragraph is revised. Paragraph 4.A.(2) is revised to change "Financing Approval" to "Credit Approval". The reference to the title of Form TREC No. 40-4 is changed to "Third Party Financing Addendum for Credit Approval". The sentence regarding Sellers failure to timely provide the existing survey or affidavit in paragraph 6.C.(1) is moved from the end of the paragraph to the middle of the paragraph; paragraph 6.E.(2) is revised to delete apostrophes to be consistent with statutory provisions; paragraph 6.E.(2) is amended to provide notice that the property may be subject to more than one property owners associations. Paragraph 7.D.(2) is rewritten to include a blank line for specific repairs and an admonishment telling parties not to insert general phrases. A notice is added to the end of paragraph 7 reminding the parties about the buyer's rights to conduct inspections, negotiate repairs under a subsequent amendment, or terminate during the option period, if any. Paragraph 9.B.(3) is rewritten; new subparagraph 5 regarding leases is added to paragraph 9.B. The two sentences at the end of paragraph 10 are underlined. Paragraph 12.A.(2) is restructured. Paragraph 15.B is changed to provide for waiver of buyer's or seller's right to

enforce specific performance if the party fails to file a petition for such and provide notice to the escrow agent within 45 days of the closing date. Paragraph 18.B. is rewritten for clarity. Addenda are added to and deleted from paragraph 22. Option Period is defined in paragraph 23. Paragraph 24 is rewritten. The Broker Information page is rewritten and restructured.

The amendment to §537.30 adopts by reference Standard Contract Form TREC No. 23-10, New Home Contract (Incomplete Construction). The adopted revisions are the same as those adopted for Form TREC No. 20-9, except for paragraph 2, paragraph 6.C.(1), paragraph 7.B., and paragraph 9.B.(5).

The amendment to §537.31 adopts by reference Standard Contract Form TREC No. 24-10, New Home Contract (Completed Construction). The adopted revisions are the same as those adopted for Form TREC No. 20-9, except for paragraph 2, paragraph 6.C.(1), paragraph 7.B., and paragraph 9.B.(5).

The amendment to §537.32 adopts by reference Standard Contract Form TREC No. 25-7, Farm and Ranch Contract. The same amendments are made as those adopted for Form TREC No. 20-9. In addition, paragraph 2.F. is revised to delete "mineral" and "royalty."

The amendment to §537.37 adopts by reference Standard Contract Form TREC No. 30-8, Residential Condominium Contract (Resale). The same amendments are made to Form TREC No. 30-8, Residential Condominium Contract as those adopted for Form TREC No. 20-9. In addition, paragraphs 2.B.(2) and 2.C.(2) are amended by adding a provision regarding Buyer's cancellation of the contract; subparagraph (3) is revised and subparagraph (4) is added to paragraph 12.

The amendment to §537.43 adopts by reference Standard Contract Form TREC No. 36-6, Addendum for Property Subject to Mandatory Membership in a Property Owners Association. Subparagraph A.2. is revised to add a reference providing an updated resale certificate. New paragraph C. is added regarding deposits for reserves.

The amendment §537.47 adopts by reference Standard Contract Form TREC No. 40-4 Third Party Financing Addendum for Credit Approval. The references to "Financing Approval" are changed to "Credit Approval." The reference to "Loan Fees" is changed to "Adjusted Original Charges" in subparagraphs (1) and (2) of paragraph A, and paragraphs C and D. The note regarding HUD 92564-CN is deleted.

The reasoned justification for the amendments and forms adopted by reference is to provide updated contract forms that reflect current law and industry practices for use by licensees, and is further articulated below in response to the comments received.

The commission received 53 comments on the rules and forms as proposed.

Comment: 33 commenters suggested changes to paragraph 6.A.(8).

Response: The commission is unable to make the recommended substantive changes without reposting all the forms for notice and comment. The commission may address the suggestions in future contract revisions.

Comment: One commenter suggested adding ice makers in the Seller's Disclosure Notice.

Response: The commission did not make the change because the TREC Seller's Disclosure Notice tracks the statutory requirements of §5.008 of the Property Code and the commission is not currently reviewing the Seller's Disclosure Notice at this time.

Comment: Two commenters disagreed with changing "financing approval" to "credit approval."

Response: The commission respectfully disagrees with the commenter, but did decide to rephrase the last part of the first sentence of the Third Party Financing Addendum for Credit Approval so that it reads: "make every reasonable effort to obtain credit approval for the financing." Additionally, the commission decided to change the title of the addendum to "Third Party Financing Addendum for Credit Approval" and to make conforming changes in paragraph 4.A.(2) and in paragraph 22 of the contract forms.

Comment: One commenter suggested revising the title of the Third Party Financing Addendum to be consistent with "Credit Approval" changes.

Response: The commission agrees with the commenter and revised the name of the form to Third Party Financing Addendum for Credit Approval as described above.

Comment: One commenter suggested deleting "if any" from paragraph 7.D.(2) and other revisions to proposed text.

Response: The commission agrees with the suggestion to delete "if any" from paragraph 7.D.(2) but respectfully disagrees with the other suggestions for further nonsubstantive editing.

Comment: Two commenters disagreed with adding the proposed paragraph that provides no survey is required.

Response: The commission concurs with the commenter and eliminated that paragraph in all the relevant forms except the Farm and Ranch Contract.

Comment: Four commenters disagreed with promulgating for required use the Non-Realty Items Addendum.

Response: The commission agrees with the commenters and decided not to promulgate the form but, instead, decided to approve the use of the form on a voluntary basis.

Comment: One commenter suggested removing the reference to city in paragraph 2.

Response: The commission respectfully disagrees with the suggestion and decided not to adopt it.

Comment: One commenter suggested changing paragraph 4.A.(1) to include a requirement for buyer to provide notice that the property has met lenders underwriting requirements or waive such requirements within 7 days, to include a reference to the paragraph number in the reference to the option period in paragraph 7.D.(2); to insert the ratification language on page 8 back to the top of the page, and to change the name of the Third Party Financing Condition Addendum as described above.

Response: The commission respectfully disagrees with the suggestions and decided not to adopt them except for the changes to the title of the Third Party Financing Condition Addendum.

Comment: One commenter suggested that the proposed changes to paragraph 15 amounted to changing the statute of limitations for filing an action for specific performance.

Response: The commission respectfully disagrees with the comment and has further clarified paragraph 15 to provide for a waiver of buyer's or seller's right to specific performance if the

party fails to file a petition for such, and provide notice to the escrow agent within 45 days of the closing date.

Comment: Two commenters generally disagreed with using the term "designee" on page 8.

Response: The commission agrees with the commenter and changed it to "licensed supervisor of associate."

Comment: One commenter suggested adding a reference to "bonus to selling agent" on page 8.

Response: The commission respectfully disagrees with the commenter and decided not to make the suggested change.

Comment: Three commenters suggested making the cost of providing the subdivision information or resale certificate a choice of expense for buyer or seller.

Response: The commission respectfully disagrees and decided not to take action in response to the comments.

Comment: One commenter suggested referencing additional transfer fees in the Addendum for Property Subject to Mandatory Membership in an Owners' Association.

Response: The commission respectfully disagrees and decided not to take action in response to the comment.

Comment: One commenter suggested increasing the time period for providing the updated resale certificate under paragraph A.2. of the Addendum for Property Subject to Mandatory Membership in an Owners' Association.

Response: The commission respectfully disagrees and decided not to take action in response to the comment.

Comment: One commenter suggested changing "or" to "and" in the bolded sentence in Paragraph 6.C.(1).

Response: The commission respectfully disagrees and decided not to take action in response to the comment.

The revisions to the rules and forms as adopted do not change the nature or scope so much that they could be deemed different rules or forms. The rules and forms as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules and forms as adopted do not impose more onerous requirements than the proposed versions and do not materially alter the issues raised in the proposed rules and forms.

The amendments and forms adopted by reference are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendments.

§537.20. Standard Contract Form TREC No. 9-8.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 9-8 approved by the Texas Real Estate Commission in 2010 for use in the sale of unimproved property where intended use is for one to four family residences. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.28. Standard Contract Form TREC No. 20-9.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 20-9 approved by the Texas Real Estate Commission in 2010 for use in the resale of residential real estate. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.30. Standard Contract Form TREC No. 23-10.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 23-10 approved by the Texas Real Estate Commission in 2010 for use in the sale of a new home where construction is incomplete. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.31. Standard Contract Form TREC No. 24-10.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 24-10 approved by the Texas Real Estate Commission in 2010 for use in the sale of a new home where construction is completed. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.32. Standard Contract Form TREC No. 25-7.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 25-7 approved by the Texas Real Estate Commission in 2010 for use in the sale of a farm or ranch. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.37. Standard Contract Form TREC No. 30-8.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-8 approved by the Texas Real Estate Commission in 2010 for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.43. Standard Contract Form TREC No. 36-6.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 36-6 approved by the Texas Real Estate Commission in 2010 for use as an addendum to be added to promulgated forms in the sale of property subject to mandatory membership in an owners' association. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.47. Standard Contract Form TREC No. 40-4.

The Texas Real Estate Commission adopts by reference standard contract form, TREC No. 40-4 approved by the Texas Real Estate Commission in 2010 for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2010.

TRD-201006923

Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: March 1, 2011
Proposal publication date: September 10, 2010
For further information, please call: (512) 465-3926

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PART 27. BOARD OF TAX PROFESSIONAL EXAMINERS

CHAPTER 623. REGISTRATION AND CERTIFICATION

22 TAC §§623.6 - 623.10

The Texas Commission of Licensing and Regulation ("Commission") adopts the repeal of 22 Texas Administrative Code ("TAC") Chapter 623, §§623.6 - 623.10 regarding property tax professionals without changes to the proposal as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6923) and will not be republished. This repeal will take effect January 1, 2011.

House Bill 2447 ("HB 2447"), 81st Legislature, Regular Session, 2009, transferred the regulatory authority over the Property Tax Professional program from the Board of Tax Professional Examiners ("BTPE") to the Texas Department of Licensing and Regulation. At the completion of this transfer, the BTPE rules were repealed and replaced with rules under the authority of Texas Occupations Code, Chapter 1151, with the exception of the classification rules for registrants under 22 TAC Chapter 623, §§623.6 - 623.10. New classification standards were postponed for the completion of a Department-sponsored Education Summit open to industry participants and the public for input and suggestions for improvement.

The repeal of the current rules allows for new rules to be adopted which consolidate all standards governing registrants, continuing education, and classifications in the property tax professionals program. The Department in a separate rulemaking action has adopted rules at 16 TAC Chapter 94 that will replace the rules affected by the repeal which furthers the Department's statutory charge to create classification standards for registrants under Texas Occupations Code, §1151.103. The repeal was recommended by the Tax Professional Advisory Committee at its meeting on September 13, 2010. A detailed summary of the proposed repeal was included in the notice of proposed rules published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6923)

The Department drafted and distributed the proposed repeal to persons internal and external to the agency. The proposed repeal was published in the August 13, 2010, issue of the *Texas Register.* The 30-day public comment period closed on September 13, 2010. The Department did not receive any public comments on the proposed repeal.

The repeal is adopted under Texas Occupations Code, Chapter 51 and Chapter 1151, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and 1151. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007014
Brian E. Francis
Deputy Executive Director, Texas Department of Licensing and Regulation
Board of Tax Professional Examiners
Effective date: January 1, 2011
Proposal publication date: August 13, 2010
For further information, please call: (512) 463-7348

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 33. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SUBCHAPTER G. ENVIRONMENTAL LEAD INVESTIGATIONS

25 TAC §33.80

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (department), adopts new §33.80 concerning the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, known in Texas as the Texas Health Steps (THSteps) Program, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6221) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

Texas Health Steps is the Texas name for the federally-mandated Medicaid program known as EPSDT. EPSDT provides medical and dental checkups, diagnosis, and medically necessary treatment to Medicaid clients from birth through 20 years of age. By authorization of HHSC, the department operates and administers the outreach and informing, medical and dental screening, and dental treatment services components of EPSDT.

The United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) informed HHSC that environmental lead investigations are a required EPSDT benefit for children with elevated blood lead levels. These investigations are currently provided through local health department lead programs or through the department's Regulatory Division when there is no local health department accessible that can provide the investigation. The adopted rule makes environmental lead investigations conducted in accordance with §37.338 and §37.339 of this title (relating to Reporting, Treatment and Investigation of Child Blood Lead

Levels), a Medicaid benefit for THSteps clients with elevated blood lead levels.

HHSC received approval of a Medicaid state plan amendment under the federal Social Security Act, 42 U.S.C. §1396 *et seq.,* from CMS to obtain federal matching funds for the service. The Medicaid benefit includes an investigation to determine the source of lead at the child's home or primary residence. The state plan amendment describes the qualified providers as certified lead risk assessors who are employed by or contractors of the state health department or local health departments.

SECTION-BY-SECTION SUMMARY

New §33.80 provides for Medicaid coverage of environmental lead investigations for THSteps clients from birth through 20 years of age with elevated blood lead levels.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new section is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006951
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 27, 2010
Proposal publication date: July 16, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 229. FOOD AND DRUG
SUBCHAPTER T. LICENSURE OF TANNING FACILITIES

25 TAC §§229.341 - 229.357

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department) adopts amendments to §§229.341 - 229.357, concerning the licensure of tanning facilities without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5470) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The Health and Safety Code, Chapter 145, was amended by House Bill (HB) 1310, 81st Legislature, Regular Session, 2009, to prohibit a minor younger than 16.5 years of age from using a tanning device and a person younger than 18 years of age from using a tanning device unless the person's parent or legal guardian, in person at the facility, consents in writing for the person to use the device. The amendments to §229.353 and §229.354 are necessary to implement legislative changes to the Health and Safety Code, Chapter 145, the Tanning Facility Regulation Act.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.341 - 229.357 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. As a result of the four-year review of the rules, §§229.341 - 229.357 have been revised to update and clarify the requirements for operating tanning facilities.

SECTION-BY-SECTION SUMMARY

Amendments to §§229.341 - 229.347, 229.353, 229.354, and 229.357 add references to "this subchapter" and delete "these sections" in order to clarify the rules.

An amendment to §229.341 adds the language "including the terms and conditions under which tanning devices at such facilities may be operated, pursuant to applicable", and the language "using ultraviolet lamps as required by applicable" is deleted in order to update the purpose of the subchapter.

Amendments to §229.341 and §229.342 add the term "rules" to supplement the reference to applicable state and federal laws and regulations, in order to clarify the applicability of state and federal rules to the regulation of tanning facilities that use tanning devices.

An amendment to §229.342(a) adds the language "governs and applies to the rules in this subchapter" and deletes the language "requires rules to regulate tanning facilities" in order to accurately describe the authority of the Tanning Facility Regulation Act with respect to the rules under the subchapter.

New §229.342(b) is added to reflect that the Executive Commissioner of the Health and Human Services Commission may adopt rules necessary to implement the Tanning Facility Regulation Act. Subsequent subsections (b) - (f) are relettered to reflect the addition of new §229.342(b).

An amendment to §229.343(1) deletes the language "Texas Civil Statutes, Article 8910 (House Bill 2352, 71st Legislature, 1989)" in order to update the reference to Health and Safety Code, Chapter 145.

An amendment to §229.343(2), (10) and (17) adds "department" and deletes the word "board" to update the reference to rules used to interpret the meaning of the term "adulterated" in the Texas Food, Drug and Cosmetic Act.

An amendment to §229.343(4) adds language to clarify the definition of "change of ownership" to include the transfer of all or part of the ownership in a tanning facility held by one person to another person.

An amendment to §229.343(5) revises the name of the department and deletes the language "or his successor" in order to update the definition of "commissioner."

Section 229.343(6) is deleted in its entirety, since the definition of "date of issuance" is no longer necessary when used in the context of the current licensing procedures for tanning facility licenses. Subsequent definitions in this section are renumbered as a result of this deletion.

An amendment to §229.343(8) replaces the title "Sunburning and Tanning History" in Figure: 25 TAC §229.343(8) with "Reaction to Sun Exposure" to the Figure in order to clarify the language in the Fitzpatrick scale as it relates to the skin's reaction to sun exposure.

An amendment to §229.344(a) deletes the term "devices" with respect to the exemption for phototherapy devices and the term "device" is added in order to accurately reflect that this subchapter does not apply to a phototherapy device used by or under the supervision of a licensed physician who is trained to use such a device.

An amendment to §229.345(c) adds the term "for" and "of" is deleted in order to clarify the need for a license prior to beginning operation.

An amendment to §229.345(d) deletes the reference to a one-year license in order to conform the subsection to the requirements for a two-year license in Health and Safety Code, §12.0112.

An amendment to §229.345(g) adds the word "a" prior to the term "license application" in order to reflect a minor grammatical correction.

New §229.345(h) is added to clarify the procedures for requesting a replacement license when a license is lost, stolen or destroyed. In addition, new §229.345(h) establishes the conditions under which the department will issue a replacement license. Subsequent subsections of this section are relettered as a result of this new subsection.

An amendment to §229.345(i) adds references to subsections (c), (g), (h), (k), and (l) and deletes existing references in order to reflect that applications required in those subsections must be completed on forms provided by the department and shall contain all the information required by such forms and any accompanying instructions.

An amendment to §229.345(j) adds the term "initial" to the reference to an application for a license to clarify that this information is required for all initial applications for a tanning facility license.

An amendment to §229.345(k) adds a reference to subsection (i) and deletes the reference to subsection (h) in order to reflect the relettering of the subsections due to the addition of new subsection (h) to the section.

An amendment to §229.346(a) deletes the reference in subsection (a)(1) to the one-year license fee order to conform the subsection to the amendments proposed in §229.345(d) and to conform the requirements in §229.346(a) to those required for a two-year license in Health and Safety Code, §12.0112. The paragraph is renumbered as a result of this deletion.

New §229.346(a)(2) is added to reflect the department's current fee of $440 associated with a license that is amended due to a change in ownership.

New §229.346(a)(3) is added to reflect the department's current fee of $220 for a license that is amended due to minor changes.

New §229.346(a)(4) is added to reflect the department's current fee of $100 for a replacement license and to conform the language in this subsection to the requirement for replacement licenses in new §229.345(h).

An amendment to §229.346(b) deletes paragraph (2), relating to delinquency fees, as the requirement is no longer representative of the current procedures for assessing fees associated with licenses amended due to a change in location, name or ownership of a tanning facility. The paragraph is restructured and numbering is eliminated as a result of this deletion.

An amendment to §229.346(c) adds references to "texas.gov" and deletes references to "Texas Online" in order to reflect the new name and Internet site for the online licensing authority. In addition, "and pay the required fees" is added to reflect that fees must be submitted with an online application.

An amendment to §229.347(b) deletes the reference to §229.345(m) and adds a reference to §229.345(n) due to the relettering of the subsections required by the addition of new §229.345(h).

An amendment to §229.347(e) deletes the reference to §229.345(k) and adds a reference to §229.345(l) due to the relettering of the subsections required by the addition of new §229.345(h).

An amendment to §229.347(f) deletes the reference to §229.345(i) and adds a reference to §229.345(j) due to the relettering of the subsections required by the addition of new §229.345(h).

An amendment to §229.348 adds the term "working" to clarify references in the section to the number of days required for licensees to notify the department of certain changes which would render the information containing in the initial license application no longer accurate.

An amendment to §229.349(c) deletes the reference to §229.345(m) and adds a reference to §229.345(n) due to the relettering of the subsections required by the addition of new §229.345(h).

An amendment to §229.350 adds the term "facility" and deletes the term "establishment" to clarify the location of warning signs posted in the entry area of the tanning facility. Also, the word "by" is replaced with the word "to" for better clarity.

An amendment to §229.351(b) adds the language "for the device" in conjunction with references to the manufacturer's maximum recommended exposure time in order to clarify requirements for timers used on a tanning device.

Amendments to §§229.351 - 229.354 and §229.356 add "customer" and delete "consumer" to more accurately reflect the use of the term in the Tanning Facility Regulation Act.

An amendment to §229.352(a) adds the language "agree to" and "at all times while using the device" with reference to the use of protective eyewear in order to conform the section to the requirements for protective eyewear in HB 1310. Furthermore, the language "that meets the requirements of the United States Food and Drug Administration" is deleted in order that it be added to §229.352(d) for clarification purposes.

An amendment to §229.352(d) adds the language "the United States Food and Drug Administration, including the require-

ments" to clarify the protective eyewear standards that are required by FDA and federal regulations.

An amendment to §229.353(c) adds the terms "instruct" and "assist" in order to conform the requirements for operators assisting customers with the use of a tanning device for the first time to the language in the Tanning Facility Regulation Act.

An amendment to §229.353(c)(2) adds the language "at all times" in reference to the use of protective eyewear in order to conform the section to the requirements for protective eyewear in HB 1310, 81st Legislative Session, 2009.

New §229.353(f) is added to prohibit an operator from allowing a person under 16.5 years of age from using a tanning device.

New §229.353(g) is added to prohibit an operator from allowing a person at least 16.5 years of age and younger than 18 years of age to use a tanning device for the first time unless a written consent that meets the requirements of the department to use the device is obtained from the person's parent or legal guardian, in person at the facility.

New §229.353(h) is added to prohibit an operator from allowing a person younger than 18 years of age to use a tanning device for the first time unless the person has displayed a driver's license or other form of identification containing the person's photograph and indicating that the person is 16.5 years of age or older.

An amendment to §229.354(b)(2) adds the language "younger than 18" and deletes "16 or 17" to reflect the age requirements for written informed consent for minors who use tanning devices in order to implement changes required by HB 1310. In addition, the language "person and the" is added to clarify that both the person and the person's parent or legal guardian are required under HB 1310 to sign a written informed consent statement. The language "The informed consent statement shall state" is added to restructure the subsection for easier comprehension. Furthermore, the language "advisory statement issued by the Texas Medical Board, and available online at http://www.dshs.state.tx.us/dmd, warning of the dangers of indoor and outdoor tanning and its association with skin cancer, eye damage, and other health risks, provided" is added in order to clarify the requirement in HB 1310 for the person and parent or legal guardian to read and understand the advisory statement. Finally, the language "at all times while using the tanning device" and "A written informed consent statement may be revoked at any time." is added to reflect requirements under HB 1310 for use of protective eyewear and duration of informed consent statements, respectively.

Section 229.354(b)(3) is deleted in its entirety in order to conform the section to the new requirements under HB 1310 for use of tanning devices by minors under the age of 18. The subsequent paragraphs are renumbered as a result of this deletion.

An amendment to §229.354(b)(4) adds the age of "16.5" and deletes the term "13" to reference the correct age of the customer. Additionally, the language in subparagraphs (A) and (B) was deleted in order to reflect the changes necessary to conform the section to the statutory provisions under HB 1310 that prohibit a person under 16.5 years of age from using a tanning device.

An amendment to §229.355(5) adds the word "location" of the tanning device to the information required to be reported to the department when an injury or illness associated with the use of a tanning device has occurred.

An amendment to §229.357(a) adds the language "compliance with" and deletes the language "are being violated" with respect to the department's inspection authority under the Tanning Facility Regulation Act. These changes are made in order to conform the language in the paragraph to the statutory language in the Act.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized under Health and Safety Code, §145.011, which provides the department with authority to adopt rules to enforce the Tanning Facility Regulation Act; and Government Code §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration and enforcement of the Health and Safety Code, including Chapter 145, the Tanning Facility Regulation Act. The amendment regarding fees for replacement licenses is adopted under Health and Safety Code, §12.0111, which requires the department to charge a fee for issuing or renewing a license in an amount to cover the costs to the department for administering its licensing programs; and Health and Safety Code, §12.0112, which requires that the term of each license issued by the department to be two years. Review of the rules implements Government Code, §2001.039, requiring the review every four years of department rules previously adopted.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006948
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 27, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 458-7111 x6972

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 13. LAND RESOURCES

SUBCHAPTER A. RULES, PRACTICE, AND PROCEDURE FOR LAND LEASES AND TRADES

31 TAC §13.2

The School Land Board adopts amendments to 31 TAC §13.2 (relating to Land Resources). The amendments are adopted without changes to the proposal as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9834) and will be not be republished.

BACKGROUND AND REASONED JUSTIFICATION

The intent of this rulemaking is to clarify and amend the rules related to approval of trades of permanent school fund land by the School Land Board (Board), in conjunction with the General Land Office (GLO), in order to reflect certain statutory changes made during the 81st Legislative Regular Session by House Bill (HB) 3461 (Acts 2009, 81st Legislature, Chapter 1175, effective June 19, 2009). That Act amended Texas Natural Resources Code §32.253, which sets forth the purposes for which land dedicated to or acquired for the use and benefit of the permanent school fund may be traded, and allowed the Board more discretion to approve trades of land which are determined to be in the best interest of the fund.

The adopted amendment to §13.2 (relating to land trades) removes existing language describing various purposes for which land dedicated to or acquired for the use and benefit of the permanent school fund may be traded in its entirety, and substitutes those purposes enumerated and described in Texas Natural Resources Code §32.253, as amended by the 81st Legislature. As amended, §13.2 will state that such lands may be traded to (1) aggregate sufficient acreage of contiguous land to create a manageable unit; (2) acquire land having unique biological, geological, cultural, or recreational value; (3) create a buffer zone for the enhancement of already existing public land, facilities or amenities; or (4) acquire land for the use and benefit of the permanent school fund as determined by the Board to be in the best interest of the fund.

The justification for adoption of the amendment is that the amendment provides clarification to the rules related to land trades, allowing trades that are in the best interest of the permanent school fund, and incorporates amendments consistent with changes made by the Texas Legislature to the GLO's governing statutes.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 13 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

CONSISTENCY WITH CMP

The adopted rulemaking is not subject to the Coastal Management Program (CMP), as outlined in 31 TAC §505.11, relating to the Actions and Rules Subject to the CMP.

PUBLIC COMMENTS

No comments were received on the adopted amendments.

STATUTORY AUTHORITY

This amendment is adopted under Texas Natural Resources Code §32.253, describing the purposes for which permanent school fund land may be traded. Texas Natural Resources Code §32.205 provides that the Board may adopt rules to carry out the provisions of Chapter 32 of the Texas Natural Resources Code.

Texas Natural Resources Code §32.253 is affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007045
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: January 2, 2011
Proposal publication date: November 5, 2010
For further information, please call: (512) 475-1859

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CHAPTER 25. BEACH CLEANING AND MAINTENANCE ASSISTANCE PROGRAM

31 TAC §§25.1 - 25.3, 25.5, 25.12, 25.13, 25.15, 25.20 - 25.22

The General Land Office (GLO) adopts amendments to Chapter 25, concerning Beach Cleaning and Maintenance Assistance Program, §25.1, relating to Definitions; §25.2, relating to General; §25.3, relating to Administration of Funds; §25.5, relating to Beach Cleaning Responsibility; §25.12, relating to Eligible Costs; §25.13, relating to Extent of State Assistance; §25.15, relating to Payment Procedures; §25.20, relating to Audit; §25.21, relating to Ineligibility; and §25.22, relating to Hearing. The amendments are adopted without changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9476) and will not be republished.

The adopted amendments incorporate the new responsibility of the state to clean and maintain public beaches under certain circumstances in Natural Resources Code, Chapter 61, Subchapter C, relating to Maintenance of Public Beaches, §61.067, relating to Duty of State, as amended by Acts 2009, 81 Legislature, Chapter 6, §1, effective September 1, 2009. The adopted rules also make minor amendments to clarify duties and procedures and to correct formatting and citation errors.

In §25.1, relating to Definitions, the adopted amendment makes minor changes to refer to the beach cleaning and maintenance reimbursement program (program) implemented under the rules as "the program," rather than using several different words and phrases to refer to the same thing. The definition of "clean and maintain" in §25.1(5) is amended to clarify that the employment

of lifeguards, beach patrols, and litter patrols are included only for cities and counties, and therefore not to the state.

The adopted amendment to §25.2(b) reflects the fact that the funding for the program comes from appropriations to the GLO and the GLO's allocation of appropriated funds to the program.

The adopted amendment to §25.3, relating to Administration of Funds, reflects that the rules relating to the program are found in Subchapter C, rather than Subchapter B, of Chapter 61 of the Natural Resources Code.

The adopted amendment to §25.5, relating to Beach Cleaning Responsibility, changes the title of the section to "Responsibilities." It also adds new §25.5(a), which sets forth the state's responsibility to provide assistance to local governments in cleaning and maintaining public beaches, including the duty to clean, maintain and remove debris from a beach in a threatened area in a declaration of a state of disaster issued under Government Code, §418.014. New §25.5(b) clarifies that the responsibility for cities to clean public beaches is found in Natural Resources Code, §61.065. New §25.5(c) clarifies that the responsibility for counties to clean public beaches is found in Natural Resources Code, §61.066. The remaining subsections are relettered.

The adopted amendments to §§25.12, 25.13, 25.15, 25.20, and 25.21 correct minor inconsistencies in the language of the rules.

The adopted amendment to §25.22, related to Hearing, updates the statutory reference to the Administrative Procedures Act, Government Code, Chapter 2001, and includes the GLO's rules of practice and procedures found in Chapter 2 of this title.

REASONED JUSTIFICATION

The justification for adoption of the amendments is that the amendments will streamline the application process for the beach maintenance reimbursement program and provide the public and local jurisdictions that participate in the program with a clearer understanding of how the process works. The adopted amendments will also implement the most recent changes to Natural Resources Code Chapter 61, Subchapter C, relating to the maintenance of public beaches and provide consistency between the statutes and rules.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

SUMMARY OF PUBLIC COMMENT

No public comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Natural Resources Code §61.067(e), which authorizes the GLO to adopt rules reasonably necessary to perform its duties under Natural Resources Code Chapter 61, Subchapter C.

The adopted amendments affect Natural Resources Code Chapter 61, Subchapter C, relating to the maintenance of public beaches. No other statutes, articles, or codes are affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006952
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: December 27, 2010
Proposal publication date: October 22, 2010
For further information, please call: (512) 475-1859

PART 4. SCHOOL LAND BOARD

CHAPTER 154. LAND SALES, ACQUISITIONS, AND TRADES

31 TAC §154.1

The School Land Board (Board) adopts amendments to 31 TAC §154.1 relating to the Sale of Permanent School Fund Land. The amendments are adopted without changes to the proposal as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9479).

BACKGROUND, REASONED JUSTIFICATION, AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The intent of this rulemaking is to clarify and assist the public in understanding the rules related to sales of permanent school fund land by the Board and to incorporate the statutory changes made during the 81st Legislative Regular Session by House Bill (H.B.) 3461 (Acts 2009, 81st Legislature, Chapter 1175, effective June 19, 2009) which amended Texas Natural Resources Code §§32.110(a), 51.052 (e) and 51.052(f).

The adopted amendments to §154.1 (relating to the Sale of Permanent School Fund Land) will add language to the definition of "surrounding land" in the rule to clarify that such land must have a common boundary with a particular tract of land approved for sale by the Board. The adopted amendments also authorize the Board to waive the special fee (an amount equal to one and one-half percent of the bid or sale amount) on land sales to any state agency, board, commission, political subdivision or other governmental entity, consistent with legislative changes. The adopted amendments also substitute the word "special" for the word "statutory" in describing this fee, in order to conform to the language used in Texas Natural Resources Code §32.110. These changes are a part of the Board's review of 31 Texas Administrative Code Chapter 154, which is being adopted concurrently with the adoption of these amendments.

The justification for adoption of the amendment is that the amendment provides clarification to the rules related to sales of permanent school fund land and incorporates amendments consistent with changes made by the Texas Legislature to the governing statutes of the General Land Office (GLO).

ENVIRONMENTAL REGULATORY ANALYSIS

The Board has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 154 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rulemaking implements legislative changes in Texas Natural Resources Code §§32.110(a), 51.052 (e) and 51.052(f) related to conditions for the sale of land and waiver of the special fee on land sales to any state agency, board, commission, political subdivision or other governmental entity.

CONSISTENCY WITH CMP

The adopted rulemaking is not subject to the Coastal Management Program (CMP), as outlined in 31 TAC §505.11, relating to the Actions and Rules Subject to the CMP.

PUBLIC COMMENT

The Board did not receive any comments on the amendments.

STATUTORY AUTHORITY

The amendments are adopted under Texas Natural Resources Code §32.110, relating to the Board's ability to waive the special fee associated with land sales to a state agency, board, commission, political subdivision or other governmental entity, Texas Natural Resources Code §32.062, requiring the Board to adopt rules of procedure and rules for sale of land under that chapter, and Texas Natural Resources Code §51.052, providing that the Board shall adopt rules to implement the preference right granted to owners of land that surround a tract of land approved for sale by the Board.

Texas Natural Resources Code §§32.110(a), 51.052 (e) and 51.052(f) are affected and implemented by the adopted amendments to §154.1.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2010.

TRD-201007049

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs

School Land Board

Effective date: January 2, 2011

Proposal publication date: October 22, 2010

For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 81. INSURANCE

34 TAC §81.1, §81.7

The Employees Retirement System of Texas (ERS) adopts amendments to 34 TAC §81.1 and §81.7, concerning Definitions and Enrollment and Participation, without changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6496). These amendments were approved by the ERS Board of Trustees at its December 3, 2010 meeting. These sections will not be republished.

Section 81.1, concerning Definitions, is amended to establish specific eligibility requirements for a dependent spouse to enroll in the Texas Employees Group Benefits Program (GBP). The amendment provides that proof of marriage to a claimed dependent spouse must be established by appropriate completed governmental records filed of record prior to the enrollment showing either a valid ceremonial (also referred to as "formal" marriage) or informal marriage as provided by Texas law. The amendment requires that a prior informal marriage must be established by a properly completed and filed declaration of informal marriage pursuant to §2.401(a)(1) of the Texas Family Code.

Section 81.7, concerning Enrollment and Participation, is amended to clarify and simplify the procedures for enrolling in the GBP. The amendment is intended to streamline the enrollment process by making it simpler for individuals to switch between coverage in an HMO and in HealthSelect℠ of Texas, and by permitting enrollment based on the submission of proof of other coverage.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Insurance Code §1551.052 which provides authorization for the ERS Board of Trustees to adopt rules necessary to implement Chapter 1551, Insurance Code, and its purposes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007001

Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

Effective date: December 30, 2010

Proposal publication date: July 23, 2010

For further information, please call: (512) 867-7421

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER W. NEGOTIATED RULEMAKING POLICY

37 TAC §§1.281 - 1.284

The Texas Department of Public Safety (the department) adopts new §§1.281 - 1.284, concerning Negotiated Rulemaking Policy, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9059).

The new rules are necessary to implement a negotiated rulemaking procedure for the adoption of department rules as required by Texas Government Code, §411.0044.

No comments were received regarding the adoption of the new rules.

The new rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0044 which authorizes commission to implement a policy to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008 for the adoption of department rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006940
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: December 27, 2010
Proposal publication date: October 8, 2010
For further information, please call: (512) 424-5848

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CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER C. COMMERCIAL VEHICLE REGISTRATION AND INSPECTION ENFORCEMENT

37 TAC §4.37

The Texas Department of Public Safety (the department) adopts amendments to §4.37, concerning Acceptance of Out-of-State Commercial Vehicle Inspection Certificate, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9060).

Amendments to §4.37 are necessary to incorporate language added to Texas Transportation Code, §548.005(3) as a result of HB 2730, 81st Legislature, 2009 relating to the exceptions of inspections only by state-certified and supervised inspection stations which became effective September 1, 2009. Section 548.005(3), and subsequently this amendment, authorizes the acceptance in this state of a certificate of inspection and approval issued in compliance with 49 C.F.R. Part 396 to a motor bus, as defined by §502.001, that is registered in this state but is not domiciled in this state.

No comments were received regarding the amendments to this section.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006941
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: December 27, 2010
Proposal publication date: October 8, 2010
For further information, please call: (512) 424-5848

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CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER C. SCHOOL BUS DRIVER SAFETY TRAINING PROGRAM

37 TAC §§14.32, 14.33, 14.36

The Texas Department of Public Safety (the department) adopts amendments to §§14.32, 14.33, and 14.36, concerning School Bus Driver Safety Training Program, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9061).

The adoption of these amendments is necessary to update the rules to reflect certification curriculum updates.

No comments were received regarding the amendments to these sections.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.022, which authorizes the department to adopt rules to administer and enforce the school bus driver safety training program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006942
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: December 27, 2010
Proposal publication date: October 8, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §14.52, §14.54

The Texas Department of Public Safety (the department) adopts amendments to §14.52 and §14.54, concerning School Bus Driver Safety Standards, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9063).

The amendments update the rules to reflect the 2011 Texas School Bus Specifications as the current publication and relieve the mandatory school bus emergency evacuation training as passed by the 81st Texas Legislature.

No comments were received regarding the amendments to these sections.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to establish safety standards for school buses used to transport students in accordance with Texas Education Code §34.003; Texas Transportation Code, §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and Texas Transportation Code, §547.7015, which authorizes the department to adopt and enforce rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of school children.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2010.

TRD-201006943
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: December 27, 2010
Proposal publication date: October 8, 2010
For further information, please call: (512) 424-5848

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 41. CONSUMER DIRECTED SERVICES OPTION

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §41.103 in Subchapter A, Introduction; §41.239 and §41.241 in Subchapter B, Responsibilities of Employers and Designated Representatives; and §41.335 in Subchapter C, Enrollment and Responsibilities of Consumer Directed Services Agencies, in Chapter 41, Consumer Directed Services Option, without changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9481).

The amendments are adopted to revise documentation requirements, such as paper submissions and hand corrections to time sheets, to allow an employer and a consumer directed services agency to document services in accordance with Chapter 68, concerning electronic visit verification (EVV) system, adopted elsewhere in this issue of the *Texas Register.*

DADS heard oral testimony from ADAPT of Texas, the Personal Attendant Coalition of Texas, the Texas Association for Home Care & Hospice, and five individuals at a public hearing held at 701 West 51st Street, Austin, Texas, on November 17, 2010.

DADS received written comments from Texas Association for Home Care & Hospice, Cuero Home Health, and two individuals. A summary of the comments and the responses follow.

Comment: One commenter noted the system must have the capability to allow corrections in the EVV system and not have to use a paper system for corrections.

Response: As a part of the request for proposal (RFP) requirement, the proposed EVV system must allow the provider an alternative to a paper correction process (e.g., the ability to identify and designate a system administrator(s) that has the ability to document schedule variances, rationale for schedule variances, and person approving those changes).

Comment: Six commenters expressed concern regarding potential increased administrative costs related to the implementation of EVV and requested DADS consider increasing rates to address this concern.

Response: This is beyond the scope of the rule. DADS does not determine provider rates. HHSC manages all cost-reporting and rate-setting activities.

Comment: Three commenters questioned the potential for savings related to EVV and asked DADS to provide projected savings information.

Response: Data gathered during the pilot will be used to evaluate any savings realized by the state.

Comment: Three commenters suggested that a pattern of fraud has not been demonstrated that would justify the implementation of an EVV system.

Response: The pilot will be used to obtain information about the implementation of EVV. Several tools are currently being de-

veloped to evaluate provider experience, consumer experience, DADS experience, and fiscal impact of the pilot.

Comment: One commenter asked if current EVV systems are compatible across languages.

Response: DADS does not currently use an EVV system; however, DADS will consider this question while developing the pilot.

Comment: Six commenters expressed concern that the location tracking element of EVV could restrict the provision of services to a client's home.

Response: The EVV system will not restrict the provision of services to a person's home. Individuals will still be allowed to receive services in accordance with existing program rules, and providers will still be expected to ensure that services are delivered in accordance with program rules, regardless of the type of EVV system that is mandated.

Comment: Six commenters expressed concern that a telephonic system requires attendants to call in. The commenters noted that clients may not have a land line, may not allow the attendant to use the land line, may only have a cell phone, may not allow the attendant to use the cell phone, and may receive service in a location other than their home.

Response: The EVV system will not restrict the provision of services. Individuals will still be allowed to receive services in accordance with existing program rules, and providers will still be expected to ensure that services are delivered in accordance with program rules, regardless of the type of EVV system that is mandated. As a part of the EVV RFP, respondents must provide solutions for these types of situations.

Comment: Two commenters indicated that the language in the rule is vague and should be deleted or clarified.

Response: The rule allows DADS the flexibility required to implement the EVV pilot, make necessary adjustments to EVV system requirements based on information gathered through the pilot, and to potentially expand use of the EVV system.

Comment: Two commenters expressed concerns that the EVV system may infringe upon their right to privacy (i.e., electronically tracking service delivery locations is tantamount to electronically tracking the individual receiving services).

Response: The pilot program outlined in the RFP limits the use of EVV to documentation of services delivered within the home of the individual receiving services. As a part of the RFP, respondents must provide alternative methods of documenting service delivery that occurs outside of the individual's home in accordance with program rules.

Comment: One commenter noted that attendants are not currently required by rule to list the tasks performed.

Response: For some programs included in the EVV pilot, current rules require a provider to ensure that services are delivered in accordance with the service plan. To evidence that the services were delivered in accordance with the service plan, service delivery must be documented. DADS does not intend to modify contract monitoring tools for purposes of the pilot; however, this information will be collected through the EVV system.

SUBCHAPTER A. INTRODUCTION

40 TAC §41.103

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007009
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2011
Proposal publication date: October 22, 2010
For further information, please call: (512) 438-3734

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SUBCHAPTER B. RESPONSIBILITIES OF EMPLOYERS AND DESIGNATED REPRESENTATIVES

40 TAC §41.239, §41.241

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007010
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2011
Proposal publication date: October 22, 2010
For further information, please call: (512) 438-3734

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SUBCHAPTER C. ENROLLMENT AND RESPONSIBILITIES OF CONSUMER DIRECTED SERVICES AGENCIES

40 TAC §41.335

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007011
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2011
Proposal publication date: October 22, 2010
For further information, please call: (512) 438-3734

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CHAPTER 68. ELECTRONIC VISIT VERIFICATION (EVV) SYSTEM

40 TAC §§68.101 - 68.103

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts new Chapter 68, §§68.101 - 68.103, concerning Electronic Visit Verification (EVV) System, without changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9485).

The new chapter is adopted to require a DADS contractor providing certain services and a consumer directed services (CDS) option participant receiving certain services to use an EVV system approved by DADS. In addition, the new chapter requires a CDS agency to make an EVV system approved by DADS available to a CDS option participant.

An EVV system approved by DADS will verify that a scheduled visit of a person providing a service described in the new chapter occurs as set forth in the service plan of the individual receiving the service. An EVV system also documents the precise time the scheduled visit begins and ends and the tasks performed. By requiring the use of an EVV system for certain services, DADS expects to realize an increase in the accuracy of service delivery documentation and a reduction in billing errors and fraudulent reporting of time worked.

DADS heard oral testimony from ADAPT of Texas, the Personal Attendant Coalition of Texas, the Texas Association for Home Care & Hospice, and five individuals at a public hearing held at 701 West 51st Street, Austin, Texas, on November 17, 2010.

DADS received written comments from the Texas Association for Home Care & Hospice, Cuero Home Health, and two individuals. A summary of the comments and the responses follow.

Comment: One commenter asked what criteria will be used to evaluate success of the pilot.

Response: The pilot will be used to obtain as much information as possible about the implementation of EVV. Several tools are currently being developed that will be used to evaluate provider experience, consumer experience, DADS experience, and fiscal impact of the pilot.

Comment: Three commenters questioned the potential for savings related to EVV and asked to be provided projected savings information.

Response: Data gathered during the pilot program will be used to evaluate any savings realized by the state.

Comment: One commenter indicated that the request for proposal (RFP) differs from the proposed rules in that it excludes the Deaf-Blind with Multiple Disabilities (DBMD) program and requested that DBMD and the Medically Dependent Children Program (MDCP) be exempted from the pilot and the rules.

Response: Due to commenters' concerns regarding the limited number of participants in the DBMD waiver, DBMD is not included in the pilot. However, DBMD is retained in the rule as it could potentially be incorporated if EVV is expanded statewide. The population served by the MDCP program is sufficient to justify inclusion in the EVV pilot and as such will remain in the pilot and the rule.

Comment: Three commenters expressed concern regarding potential increased administrative costs related to the implementation of EVV and requested DADS consider increasing rates to address this concern.

Response: This is beyond the scope of the rule. DADS does not determine provider rates. HHSC manages all cost-reporting and rate-setting activities.

Comment: One commenter recommended that the pilot be implemented in Region 9.

Response: The pilot region will be selected from one of the regions identified in the RFP based on internal analysis and respondent recommendations. The commenter's recommendation will be considered when determining region selection.

Comment: One commenter expressed concern that the use of EVV will result in a more punitive contract monitoring process.

Response: The EVV initiative is not intended to produce a more punitive monitoring process. EVV is intended to find savings and maintain services by verifying that consumers are receiving the services authorized for their support and for which the state is currently being billed. Regardless of the method used to document service delivery, providers, as always, are expected to ensure that services are delivered in accordance with program rules.

Comment: One commenter indicated that the EVV system must have the capability to allow for corrections in the system and not require use of a paper system for corrections.

Response: As a part of the RFP requirement, the proposed EVV system must allow the provider an alternative to a paper correction process (e.g., the ability to identify and designate a system administrator(s) that has the ability to document schedule variances, rationale for schedule variances, and person approving those changes).

Comment: Three commenters suggested that a pattern of fraud has not been demonstrated that would justify the implementation of an EVV system.

Response: The pilot will be used to obtain information about the implementation of EVV. Several tools are currently being developed that will be used to evaluate provider experience, consumer experience, DADS experience, and fiscal impact of the pilot.

Comment: One commenter suggested that agencies who primarily serve individuals in STAR+PLUS areas may decide to terminate their Community Attendant Services and Family Care contracts rather than implement EVV.

Response: DADS acknowledges this concern; however, STAR+PLUS program requirements are outside the purview of DADS; it is a program administered by HHSC.

Comment: One commenter asked if current EVV systems are compatible across languages.

Response: DADS does not currently use an EVV system; however, DADS will consider this question while developing the pilot.

Comment: One commenter noted that some DADS programs allow the clients and the agency to change tasks as clients' needs change, which would require frequent attendant training to enter the tasks for the current service plan.

Response: As a part of the EVV RFP, respondents are required to submit a detailed training plan that illustrates how provider staff will be trained and how service recipients will be informed about the system.

Comment: Six commenters expressed concern that the location tracking element of EVV could restrict the provision of services to a client's home.

Response: The EVV system will not restrict the provision of services to a person's home. Individuals will still be allowed to receive services in accordance with existing program rules, and providers will still be expected to ensure that services are delivered in accordance with program rules, regardless of the type of EVV system that is mandated.

Comment: Six commenters expressed concern that a telephonic system requires attendants to call in. The commenters noted that clients may not have a land line, may not allow the attendant to use the land line, may only have a cell phone, may not allow the attendant to use the cell phone, and may receive service in a location other than their home.

Response: The EVV system will not restrict the provision of services. Individuals will still be allowed to receive services in accordance with existing program rules, and providers will still be expected to ensure that services are delivered in accordance with program rules, regardless of the type of EVV system that is mandated. As a part of the EVV RFP, respondents must provide solutions for these types of situations.

Comment: One commenter noted that the proposed rule has no provision for "companion" cases, where there is more than one individual receiving services at the same location.

Response: As a part of the EVV RFP, respondents should provide a solution for this circumstance in their proposals.

Comment: One commenter noted that attendants are not currently required by rule to list the tasks performed.

Response: For some programs included in the EVV pilot, current rules require a provider to ensure that services are delivered in accordance with the service plan. To evidence that services were delivered in accordance with the service plan, service delivery must be documented. DADS does not intend to modify contract monitoring tools for purposes of the pilot; however, DADS will collect this information through the EVV system.

Comment: Two commenters indicated that the language in the rule is vague and should be deleted or clarified.

Response: The rule allows DADS the flexibility required to implement the EVV pilot, make necessary adjustments to EVV system requirements based on information gathered through the pilot, and to potentially expand use of the EVV system.

Comment: One commenter indicated that the agency should not mandate that providers use a single EVV vendor.

Response: The services of a single vendor will be procured for the EVV system. All providers in the selected region will be required to use the agency-procured EVV system. Providers may also continue to use their existing EVV vendor with whatever services or software they choose or add features to the agency-procured system at their own expense.

Comment: One commenter asked how DADS will have access to the EVV system at any time.

Response: As a part of the EVV RFP, respondents are required to describe how DADS will be given real-time access to the proposed EVV system. The particular technological requirements necessary to create this interface will be evaluated and considered during the proposal review process.

Comment: Six commenters expressed concern that implementation of EVV would increase workload for provider staff.

Response: Data obtained from the pilot will be used to evaluate the effect EVV has on provider staff.

Comment: Six commenters expressed concern that small providers would be incapable of absorbing costs associated with purchase, installation, and training related to implementation of EVV. These individuals noted that this situation could ultimately result in individuals experiencing limited choice in service providers.

Response: The intent of EVV is not to restrict provider selection. Through the RFP process, the agency will procure the services of a single vendor that will be responsible for the provision of EVV services in the pilot region. The pilot will be used to study potential program impacts of EVV implementation.

Comment: Two commenters expressed concerns that the EVV system may infringe upon their right to privacy (i.e., electronically tracking service delivery locations is tantamount to electronically tracking the individual receiving services).

Response: The pilot program outlined in the RFP limits the use of EVV to documentation of services delivered within the home of the individual receiving services. As a part of the RFP, respondents must provide alternative methods of documenting service delivery that occurs outside of the individual's home per program rules.

Comment: One commenter suggested that only large providers be mandated to implement EVV.

Response: During the rule development process, DADS received considerable stakeholder input that indicated the EVV system must be implemented for all providers, large and small, to ensure that it is fair and effective.

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007008
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2011
Proposal publication date: October 22, 2010
For further information, please call: (512) 438-3734

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PART 17. STATE PENSION REVIEW BOARD

CHAPTER 603. OFFICERS AND MEETINGS

40 TAC §§603.20, 603.30, 603.40, 603.50, 603.60

The State Pension Review Board (the Board) adopts the repeal of Chapter 603, §§603.20, 603.30, 603.40, 603.50, and 603.60, concerning the Meetings and Notices, Officers, Quorum, Committees, and Robert's Rules of Order, respectively, without changes to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7006) and will not be republished.

BACKGROUND AND PURPOSE

The Board adopted the repeal of §§603.20, 603.30, 603.40, 603.50, and 603.60 because the said rules concern the internal operations of the Board and, therefore, are better suited to inclusion in the Board Bylaws that the Board adopted as its formal governing document on December 8, 2010. The Board, in the process of reviewing and reorganizing its governance process, determined that it will require a more comprehensive document to govern itself than what the rules proposed for repeal provide. The Board first instructed its staff to conduct an extensive research, including a review of recommendations pertaining to governing documents provided by relevant state agencies and a review of procedures followed by comparable governing boards, in order to identify a standard governing document for the Board. After completing an open review and discussion of the staff's findings, the Board concluded that it shall consider adopting Bylaws to establish a permanent framework and criteria for its operations.

The 30-day comment period ended on September 12, 2010, and no comments were received concerning the proposed repeal.

The Board approved the final order adopting the repeal on December 8, 2010.

The adopted repeals are authorized by the Texas Government Code §801.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2010.

TRD-201006981
Lynda Baker
Staff Services Officer
State Pension Review Board
Effective date: December 29, 2010
Proposal publication date: August 13, 2010
For further information, please call: (512) 463-1736

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 218. MOTOR CARRIERS

SUBCHAPTER F. ENFORCEMENT

43 TAC §218.71

The Texas Department of Motor Vehicles (department) adopts amendments to §218.71, concerning Administrative Penalties, relating to limitations on the assessment and amount of administrative penalties. The amendments to §218.71 are adopted without changes to the proposed text as published in the November 5, 2010 issue of the *Texas Register* (35 TexReg 9867) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §643.251 and §645.003 establish authority for administrative penalties for violations of Transportation Code, Chapters 643 and 645. Transportation Code, §1002.001 authorizes the adoption of rules by the department. The current rule has led to some confusion since the maximum administrative penalty amounts specified by Transportation Code, §643.251 appear to be dollar limits on individual enforcement actions, while the current rule's wording appears to be a dollar limit on each violation within that enforcement action. The amendment clarifies the rule and conforms it to Transportation Code, §643.251.

The amendment to §218.71(a) clarifies that the department's ability to impose administrative penalties is limited by the long-standing constitutional requirement of notice and opportunity for hearing. This change emphasizes the right of the motor carrier to a due process hearing.

Amendments to §218.71(b) conform the rule terminology to that of the statute, to reflect the nature of the penalty as being administrative.

The amendments to §218.71(b)(1) clarify that the $5000 limit for violations that are not knowingly made applies to the entire enforcement action and not to each violation within that enforcement action.

The amendment to §218.71(b)(2) clarifies that the $15,000 limit for violations that are knowingly made applies to each violation within that enforcement action. The term "motor carrier" is used to replace "person" to conform to the statute.

The amendment to §218.71(b)(3) clarifies that the $15,000 limit for violations that are knowingly made is additionally limited to $30,000 per enforcement action. Language relating to the meaning of "multiple violations" is deleted as unneeded since the limitation applies to an enforcement action, not "multiple violations."

COMMENTS:

Comments supporting the proposal were received from the Texas Motor Transportation Association and the Southwest Movers Association. Both associations urged adoption of the rule.

RESPONSE:

The department appreciates the industry's support of the proposal.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §643.003 and §645.003 which authorize the Board to adopt rules to enforce Transportation Code, Chapters 643 and 645.

CROSS REFERENCE TO STATUTE

Transportation Code, §643.251 and §645.003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2010.

TRD-201007000
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: December 30, 2010
Proposal publication date: November 5, 2010
For further information, please call: (512) 463-8683

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 137 concerning Disability Management. This review is pursuant to Government Code §2001.039.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

Subchapter A. General Provisions

§137.1. Disability Management Concept

Subchapter B. Return to Work

§137.10. Return to Work Guidelines

§137.41. Purpose

§137.42. Definitions

§137.43. Return-to-Work Reimbursement Program Administrator

§137.44. Return-to-Work Reimbursement Program for Employers

§137.45. Employer Eligibility for Disbursements from the Return-to-Work Reimbursement Program

§137.46. Application for Funds from the Return-to-Work Reimbursement Program

§137.47. Criteria for Return-to-Work Reimbursement Program Applications

§137.48. Return-to-Work Reimbursement Program Administrator Determinations

§137.49. Optional Preauthorization Plan

§137.50. Optional Advance of Funds Plan

§137.51. Monitoring and Enforcement

Subchapter C. Treatment Guidelines

§137.100. Treatment Guidelines

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on January 24, 2011; comments may be submitted by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Legal Services, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1645.

TRD-201007121
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 15, 2010

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Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rule contained in Chapter 156 concerning Representation of Parties Before the Agency--Carrier's Austin Representative. This review is pursuant to Government Code §2001.039.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt this rule:

§156.1. Carrier's Austin Representative

Comments regarding whether the reason for adopting this rule continue to exist must be received by 5:00 p.m. on January 24, 2011; comments may be submitted by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Legal Services, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

TRD-201007123
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 15, 2010

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Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 160 concerning Workers' Health and Safety--General Provisions. This review is pursuant to Government Code §2001.039.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

§160.2. Non-Subscribing Employer's Report of Injury

§160.3. Subscribing Employer's Report of Injury

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on January 24, 2011; comments may be submitted by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Legal

Services, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

TRD-201007122
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 15, 2010

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 291 (§§291.1 - 291.3, 291.5 - 291.11, 291.14 - 291.15, 291.17 - 291.19, 291.22 - 291.24, and 291.27 - 291.29), concerning All Classes of Pharmacies, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

All comments regarding the rule review may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

TRD-201007106
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 14, 2010

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The Texas State Board of Pharmacy files this notice of intent to review Chapter 291 (§§291.91 - 291.94), concerning All Classes of Pharmacies, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

All comments regarding the rule review may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8008. Comments must be received by 5:00 p.m., February 1, 2011.

TRD-201007107
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 14, 2010

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Adopted Rule Reviews

Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice (TBCJ) has completed its review of §163.45, concerning Distribution of Community Corrections Funding, in accordance with the requirements of Texas Government Code §2001.039. Notice of the review was published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6541). No comments were received as a result of that notice.

The TBCJ has determined the reason for initially adopting §163.45 continues to exist, which is to ensure that available community corrections program funding shall be allocated to each community supervision and corrections department according to an established allocation formula in accordance with applicable law and the Texas Department of Criminal Justice rules and policy; and the TBCJ hereby readopts this section.

TRD-201006996
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 9, 2010

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Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 62, Commissioner's Rules Concerning the Equalized Wealth Level, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 62 in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9119).

Relating to the review of 19 TAC Chapter 62, the TEA finds that the reasons for adopting §§62.1001, 62.1011, 62.1031, 62.1041, 62.1051, and 62.1071 continue to exist and readopts the rules. The TEA finds that the reasons do not exist for adopting §62.1061, Election of Trustees of District Consolidated by Commissioner. The section was adopted to modify an election date specified in statute, as authorized by the Texas Education Code (TEC), §41.006(b). The election date has since been amended under the TEC, §41.253(b), making the section unnecessary. The TEA received no comments related to the review of Chapter 62. At a later date, the TEA plans to propose revisions to Chapter 62 to repeal §62.1061 and update provisions for the administration of wealth equalization to align with statute.

This concludes the review of 19 TAC Chapter 62.

TRD-201007125
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 15, 2010

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General Land Office

Title 31, Part 1

In accordance with the notice of proposed rule review published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9377), the Texas General Land Office (GLO) has reviewed and considered for readoption, revision or repeal Title 31, Part 1, Chapter 15, Subchapter A concerning Management of the Beach/Dune System, Subchapter B concerning Coastal Erosion Planning and Response, and Subchapter D concerning Certification of Coastal Wetlands. The rule review was conducted under the GLO's rule review plan published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3297), as required by Texas Government Code §2001.039.

No public comments were received on the proposed rule review.

The GLO considered, among other things, whether the reasons for adoption of these rules continue to exist. As a result of the review, the GLO determined that the rules in Title 31, Part 1, Chapter 15, Subchapter A concerning Management of the Beach/Dune System, Subchapter B concerning Coastal Erosion Planning and Response, and Subchapter D concerning Certification of Coastal Wetlands, are still necessary, with revisions necessary to reflect recent legislative changes and

agency practices. A Notice of Proposed Rulemaking to adopt amendments to Chapter 15, Subchapter B concerning Coastal Erosion Planning and Response is published elsewhere in this issue.

This completes the GLO's review of Title 31, Part 1, Chapter 15, Subchapter A concerning Management of the Beach/Dune System, Subchapter B concerning Coastal Erosion Planning and Response, and Subchapter D concerning Certification of Coastal Wetlands.

TRD-201007048
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Filed: December 13, 2010

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School Land Board

Title 31, Part 4

Following the publication of the notice of intent to review in the June 11, 2010, issue of the *Texas Register* (35 TexReg 5082), and in accordance with the requirements of Texas Government Code §2001.039, the School Land Board (Board) has reviewed and considered for readoption, revision, or repeal, all sections of Chapter 154 (relating to Land Sales, Acquisitions, and Trades) of Title 31, Part 4 of the Texas Administrative Code.

The Board considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

During its review, the Board determined that the agency rulemaking authority remains in effect and the necessity of these rules continues to exist. The Board intends to *readopt with amendments* 31 TAC §154.1. Revisions to this rule are necessary to clarify and assist the public in understanding the rules related to sales of permanent school fund land by the Board and to incorporate the statutory changes made during the 81st Legislative Regular Session by House Bill (HB) 3461 (Acts 2009, 81st Leg., Ch. 1175, eff. June 19, 2009) which amended Texas Natural Resources Code §§32.110(a), 51.052 (e) and 51.052(f). The remaining sections of 31 TAC Chapter 154 are adopted *without change.*

Through a concurrent notice of final adoption, the Board adopts amendments to 31 TAC §154.1 (relating to the Sale of Permanent School Fund Land).

This completes the SLB's review of 31 TAC Chapter 154.

TRD-201007050
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
School Land Board
Filed: December 13, 2010

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §49.3

Program Calendar

Due Date	Documentation Required
12/20/2010	Application Acceptance Period Begins (Competitive HTC Only).
12/20/2010	Pre-application Neighborhood Organization Request Date (Competitive HTC Only).
12/31/2010	Pre-application Response to Neighborhood Organization Request Date (Competitive HTC Only).
01/07/2011	Pre-Application Final Delivery Date (Competitive HTC Only).
01/21/2011	Full Application Neighborhood Organization Request Date (Competitive HTC Only). For Tax-Exempt Bond, Rural Rescue, HOME or HTF Applications the request must be sent no later than fourteen (14) days prior to the submission of the Threshold Documentation.
02/15/2011	Experience Certification Delivery Date (For Tax-Exempt Bond Applications the Experience Certification Documentation must be submitted with the Application).
02/22/2011	Full Application Response to Neighborhood Organization Request Date (Competitive HTC Only). For Tax-Exempt Bond, HOME or HTF Applications the response should be received no later than seven (7) days prior to the Application submission.
03/01/2011	Full Application Delivery Date (Competitive HTC Only).
03/01/2011	Quantifiable Community Participation (QCP) Delivery Date (Competitive HTC Only).
03/01/2011	Unit of General Local Government Resolutions for Applications applying for TDHCA HOME funds and selecting §49.9(a)(5) points (must be submitted with Application).
03/01/2011	Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable). For Tax-Exempt Bond Developments the Third Party Reports must be submitted no later than 60 days prior to the Board meeting at which the tax credits will be considered. The 60 day deadlines are available on the Department's website.

Due Date	Documentation Required
03/02/2011	Rural Rescue Application Submission Period (Ends 11/15/2011).
04/01/2011	Input from State Senator or Representative Delivery Date (Competitive HTC Only).
04/01/2011	Market Analysis Delivery Date (Competitive HTC Only).
04/01/2011	Resolutions Delivery Date (For Tax-Exempt Bond Developments all resolutions are due no later than 14 days prior to the Board meeting at which the tax credits will be considered).
Mid-May	Final Scoring Notices Issued (Competitive HTC Only).
06/01/2011	Withdraw Deadline for State Senator or Representative Letters (Competitive HTC Only).
06/15/2011	Application Challenges Deadline (Competitive HTC Only).
Late June	Release of Eligible Applications for Consideration for Award in July (Competitive HTC Only).
Late July	Final Awards (Competitive HTC Only).
Mid-August	Commitments are Issued (Competitive HTC Only).
11/01/2011	Carryover Documentation Delivery Date (Competitive HTC Only).
07/01/2012	10% Test Documentation Delivery Date (Competitive HTC Only).
07/01/2012	Documentation of Commencement of Substantial Construction Delivery Date (Competitive HTC Only).
12/31/2013	Placement in Service Deadline (Competitive HTC Only).
Forty-five (45) days prior to Board meeting	Amendment Requests.
Fifteen (15) business days prior to Board meeting	Extension Requests.

Figure: 31 TAC §70.15

Approved Exotic Aquatic Plants

Species	Common Name
Acorus calamus	Green sweetflag, Variegated Acorus
Acorus gramineus	Japanese sweet flag, Grass leaf sweet flag
Acrostichum danaeifolium	Giant leather fern
Aeschynomene fluitans	Floating pea vine, Giant sensitive plant
Alocasia plumbae	Metallic taro, Plumbae
Alternanthera ficoidea	Cherry hedge, Bronze hedge, Joseph's coat, Sanguinarea
Alternanthera reineckii	Telanthera, Red hygrophila, Scarlet hygro
Ammannia gracilis	Red-stem, Delicate Ammannia
Anubias afzelii	Congensis, Afzelli
Anubias barteri	Barteri, Coffefolia, Nana
Anubias congensis	Congensis
Anubias gigantea	
Anubias gillettii	Arrow-head anubias
Anubias gracilis	
Anubias hastifolia	
Anubias heterophylla	Congo anubias
Anubias minima	
Anubias pynaertii	
Aponogeton boivinianus	Boivinianus
Aponogeton capuronii	Capuron's Aponogeton
Aponogeton crispus	Ruffled wavy-edged sword plant, Crinkled Aponogeton
Aponogeton distachyos	Water Hawthorne bulbs
Aponogeton longiplumulosus	
Aponogeton madagascariensis	Madagascar lace plant
Aponogeton natans	Floating lace plant, Drifting swordplant
Aponogeton rigidifolius	Rigidleaf laceplant
Aponogeton stachysporus	
Aponogeton ulvaceus	
Aponogeton undulatus	
Bacopa australis	
Bacopa lanigera	Hairy water hyssop
Bacopa myriophylloides	Brazilian Bacopa, Fine leaf water hyssop, South American Bacopa
Barclaya longifolia	Orchid lily
Baumea rubiginosa	Soft twig rush, Golden swords
Blyxa auberti	Roundfruit Blyxa
Blyxa japonica	Bamboo plant
Bolbitis heteroclita	El Nino fern, Asian water fern
Bolbitis heudelotii	African water fern, Creeping fern, Congo fern
Butomus umbellatus	Flowering rush
Cabomba aquatica	Green Cabomba, Yellow Cabomba

Cabomba furcata	Red Cabomba
Carex laxiculmis	Spreading sedge
Carex muskingumensis	Palm sedge, Muskingum sedge
Carex nigra	Smooth black sedge, Black flowering sedge
Caulerpa paspaloides	Razor algae
Ceratophyllum submersum	Soft hornwort
Chamaedorea elegans	Parlor palm
Chara canescens	Bearded stonewort
Cladophora aegagropila	Moss balls
Colocasia affinis	Elephant ear
Colocasia gigantea	Giant elephant ear
Crinum calamistratum	African onion plant, Cameroon crinum
Crinum hardyii	Hardy swamplily
Crinum natans	Floating crinum
Crinum oliganthum	West Indies mini, Dwarf bog lily
Crinum procerum	Queen Emma's purple Crinum
Crinum thaianum	Onion plant
Cryptocoryne affinis	Prolific cryptocoryne
Cryptocoryne albida	Albida crypt
Cryptocoryne ciliata	
Cryptocoryne lingua	
Cryptocoryne longicauda	
Cryptocoryne lucens	
Cryptocoryne moehlmannii	Moehlmannii crypt
Cryptocoryne nurii	Nuri crypt
Cryptocoryne parva	Tiny cryptocoryne, Dwarf cryptocoryne
Cryptocoryne petchii	Micro crypt
Cryptocoryne pontederifolia	
Cryptocoryne retrospiralis	Retro crypt
Cryptocoryne spiralis	Spiral water trumpet
Cryptocoryne undulata	Broadleaf watertrumpet, Undulated crypt
Cryptocoryne walkeri	
Cymopolia barbata	
Cyperus percamentus	Dwarf Mexican papyrus
Dictyota divaricata	
Dionea muscipula	Venus flytrap
Dracaena fragrans	Corn plant, Chinese money tree, Cornstalk Dracaena
Echinodorus amazonicus	Amazon sword
Echinodorus aschersonianus	Ascherons sword plant
Echinodorus bleheri	Amazon sword
Echinodorus bolivianus	Bolivian burhead
Echinodorus grisebachii	
Echinodorus horizontalis	Honduran sword plant
Echinodorus palaefolius	Mexican sword plant
Echinodorus portoalegrensis	Porto Alegre sword
Echinodorus schlueteri	
Echinodorus uruguayensis	Uruguayensis sword
Egeria najas	Light green Anacharis

Eleocharis tuberosa	Chinese water chestnut rush
Entromorpha compressa	
Equisetum giganteum	Giant horsetail
Equisetum scirpoides	Dwarf Horsetail
Eriocaulon cinerrum	Hatpins, Ashy pipewort
Euryale ferox	Gorgon, Prickly waterlily
Fontinalis antipyretica	Antifever fontinalis moss
Glossostigma elatinoides	Glosso, Mud mat
Gracilaria mammilaris	
Gymnogongrus griffithsiae	
Halimeda opuntia	Brittle-disc seaweed
Hemianthus callitrichoides	Dwarf baby tears
Hemianthus micranthemoides	Baby tears
Hemigraphis exotica	Purple waffle
Hemigraphis repanda	Dragon flame
Hibiscus acetosella	African rosemallow, Water hybiscus, Red night blooming
Hibiscus coccineus	Red water hibiscus
Hottonia palustris	Water violet, Featherfoil
Hydrolea corymbosa	Skyflower
Hymenocallis speciosa	Green-tinge spiderlily
Iris ensata	Japanese iris
Iris laevigata	Rabbitear iris
Iris tectorum	Wall iris, Japanese roof iris
Iris versicolor	Harlequin blue flag, Larger blue flag, Northern blue flag
Isoetes lacustris	
Juncus glaucus	Common Rush, Blue Rush
Juncus inflexus	European meadow rush
Juncus spiralis	Corkscrew Juncus
Lagenandra thwaitesii	Silver edged sword
Lilaeopsis brasiliensis	Micro sword
Lilaeopsis carolinensis	Giant micro sword, Lilaeopsis
Lilaeopsis mauritiana	Narrow leaf micro sword
Limnophila aromatica	Rice paddy herb
Ludwigia inclinata	
Ludwigia ovalis	
Ludwigia sedioides	Mosaic plant
Marsilea mutica	Variegated clover
Menyanthes trifoliata	Bog bean
Microsorium pteropus	Java fern, Narrow leaf Java fern
Monosolenium terenum	
Montrichardia linifera	Aninga, Mokko-mokko, Moko-moko
Myriophyllum mattogrossense	Brazil milfoil, Matogrosso milfoil
Myriophyllum simulans	Milfoil, Myrio filigree, Frill foxtail
Najas gracillima	Thread-like naiad, Waternymph
Nelumbo nucifera	East Indian lotus, Oriental lotus
Neptunia aquatica	Sensitive plant
Nesaea crassicaulis	

Nesaea pedicellata	Golden, Orange African hygro
Nuphar japonica	Japanese spatterdock, Cape Fear MD spatterdock
Nymphaea alba	White water lily, White lotus, Nenufar blanco
Nymphaea amazonum	Amazon waterlily
Nymphaea atrans	
Nymphaea belophylla	
Nymphaea caerulea	Egyptian lotus
Nymphaea candida	Dwarf white waterlily
Nymphaea capensis	Cape blue waterlily
Nymphaea carpentariae	
Nymphaea colorata	Blue pigmy
Nymphaea conardii	Roundleaf waterlily
Nymphaea divaricata	
Nymphaea elleniae	
Nymphaea gardneriana	
Nymphaea georginae	
Nymphaea gigantea	Giant waterlily, Austrailian waterlily
Nymphaea glandulifera	Sleeping beauty waterlily
Nymphaea gracillis	
Nymphaea guineensis	
Nymphaea hastifolia	
Nymphaea heudelotii	
Nymphaea immutabilis	
Nymphaea jamesoniana	Jameson's waterlily, James' waterlily
Nymphaea lasiophylla	
Nymphaea leibergii	Dwarf waterlily, Leiberg's waterlily
Nymphaea lingulata	
Nymphaea lotus	Egyptian white waterlily, White lotus, White waterlily, Tiger lotus, Red tiger lotus
Nymphaea macrosperma	
Nymphaea micrantha	
Nymphaea minuta	
Nymphaea nouchali	Red and blue waterlily
Nymphaea novogranatensis	
Nymphaea ondinea	
Nymphaea ovalifolia	
Nymphaea oxypetala	
Nymphaea petersiana	
Nymphaea potamophila	
Nymphaea prolifera	
Nymphaea pubescens	Hairy waterlily
Nymphaea pulchella	
Nymphaea pygmaea	
Nymphaea rubra	India red waterlily
Nymphaea rudgeana	Rudge's waterlily
Nymphaea stuhlmannii	
Nymphaea sulphurea	
Nymphaea tenerinervia	
Nymphaea tetragona	Pygmy waterlily

Nymphaea thermarum	Pygmy Rwandan waterlily
Nymphaea togoensis	
Nymphaea violacea	
Nymphoides aurantiaca	
Nymphoides cristata	White variegated snowflake
Oenanthe javanica	Japanese parsley, Korean sunrise, Variegated water celery
Oryza sativa	Rice, including Red Rice
Penicillus lamourouxii	Shaving brush plant
Physostegia leptophylla	Florida crypt, Obedient plant
Pilea cadierei	Aluminum plant, Watermelon plant
Pontederia dilatata	Royal blue pickerel
Ranunculus flammula	Miniature spearwort, Lesser spearwort, Greater creeping
spearwort, English water buttercup	
Ranunculus rivularis	Feather leaf Ranunculus, Small river buttercup, Waoriki
Regnellidium diphyllum	Two leaf water clover
Riccia fluitans	Crystalwort
Rotala macrandra	Giant red Rotala
Rotala wallichii	
Rumex sanguineus	Redvein dock
Sagittaria filiformis	Threadleaf arrowhead, Narrow-leaf arrowhead
Sagittaria isoeitformis	Quillwort arrowhead
Sagittaria subulata	Dwarf Sagittaria
Sarracenia rubra	Sweet pitcherplant
Saururus chinensis	Chinese lizard's tail
Scirpus albescens	White rush
Spathiphyllum tasson	Brazil sword
Thalia geniculata	Red stemmed Thalia
Typhonodorum lindleyana	Via, Water banana
Vallisneria nana	Eelgrass, ribbonweed
Vesicularia dubyana	Java moss
Victoria amazonica	Amazon waterlily
Victoria cruziana	Santa Cruz waterlily, Irupe
Villarsia reniformis	Yellow marsh flower
Xanthosoma atrovirens	Mickey Mouse taro
Zephyranthes candida	Dwarf onion plant, Pink zephyr lily
Zephyranthes grandiflora	Rain lily, Pink rain lily, Pink storm lily, Rosepink zephyr lily

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposals: 2011 Speciality Crop Block Grant Program

Statement of Purpose. Pursuant to the Texas Agriculture Code, §12.002, and §12.007, the Texas Department of Agriculture (TDA) hereby requests proposals for reimbursable projects designed to solely enhance the competitiveness of specialty crops.

Specialty Crop Block Grant Program (SCBGP) funds will be made available to Texas from the Federal 2009 fiscal year budget. Although the United States Department of Agriculture - Agricultural Marketing Service (USDA-AMS) has not officially released SCBGP funds to the states, TDA anticipates approximately $1.8 million will be available for Texas projects. Notice of funds and solicitation of proposals will be published each year in the *Texas Register.* Funding from the United States Department of Agriculture (USDA) - Agricultural Marketing Service (AMS) under the Specialty Crop Block Grant Program is authorized by the Food, Conservation, and Energy Act of 2008 (Farm Bill), which amended the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note) and authorized the USDA to provide grants to States for each of the fiscal years 2008 through 2012 to enhance the competitiveness of specialty crops.

Eligibility. Responses will be accepted from other agencies, universities, institutions, and producer, industry or community-based organizations involved with specialty crops.

Please note: Grant funds will not be awarded for projects that directly benefit or provide a profit to a single organization, institution or individual.

Funding Areas/Preferences. Specialty crops are defined as fruits and vegetables, dried fruit, tree nuts and nursery crops (including floriculture). Refer to Attachment 1 of this Request for Proposals for a list of common specialty crops.

TDA encourages organizations to develop projects to solely enhance the competitiveness of specialty crops pertaining to the following issues affecting the specialty crop industry:

Food Safety - Possible projects include but are not limited to assisting entities in the specialty crop distribution chain in developing "Good Agricultural Practices", "Good Handling Practices", "Good Manufacturing Practices" or researching new methods to improve food safety.

Marketing - These projects may include marketing strategies that are geared at increasing the sales or consumption of specialty crops through media and advertising campaigns, in-store demonstrations, promotional events or development of educational opportunities and literature.

Nutrition - Projects may focus on increasing child and adult nutrition knowledge and consumption of specialty crops.

Plant Health - Projects investing in the prevention, control, or eradication of pests and diseases harmful to specialty crops.

Value Added Projects and Industry Development-Projects may include support for development of value added processing facilities, establishment of certification programs and improvement of distribution methods, industry feasibility or development of a new industry, marketing research or research on a new tool to improve marketability.

Funding Parameters.

Projects will be funded at varying levels depending on the nature of the project. All projects must demonstrate strong justification for the requested budget as well as the potential for providing significant demonstrable benefits to Texas specialty crops. Selected projects will receive funding on a cost reimbursement basis. Funds will not be advanced to grantees.

TDA reserves the right to fund proposals partially or fully. Where more than one (1) proposal on an eligible research topic is acceptable for funding, TDA may request cooperation between grantees or revision/adjustment to a proposal in order to avoid duplication and to realize the maximum benefit to the state.

TDA may choose to use a portion of the funds for projects conducted internally, such as some specialty crop marketing campaigns, promotions, surveys, or cost-share arrangements.

Funding Cycle. Selected projects may be funded at varying lengths, ranging from six (6) months to three (3) years, depending on the nature of the project. Proposals requesting funding for a term longer than one (1) year must include strong justification and may be subject to partial funding for a shorter term. Proposals may be resubmitted in subsequent years for continued/additional funding.

Proposal Requirements. Each proposal narrative may not exceed six (6) pages (not including supporting documents). The acceptable font size is 12 point, and all margins must be 1 inch. Application Form ER-121, blank Project Narrative form and Guidance documents can be downloaded from the TDA website under the Grants and Funding tab at www.texasagriculture.gov.

A complete, hard copy application with signature must be mailed. The Project Narrative must be submitted by email in a Microsoft Word document.

Proposals must include all of the following information:

1. **Application Form ER-121**

2. **Project Narrative** - Must contain the following information. **Please refer to application instruction and guidance document on TDA's website, www.texasagriculture.gov, for appropriate format.**

a. Project Title;

b. Partner Organization;

c. Abstract;

d. Project Purpose;

e. Potential Impact;

f. Expected Measurable Outcomes;

g. Project Oversight;

h. Project Commitment;

i. Work Plan;

j. Budget Narrative; and

k. Program Income.

3. **Letter of Industry Support -** must be included with the application.

Evaluation of Information. Information submitted to TDA will be evaluated based on the following criteria:

Relevance and Effectiveness: Do the objectives and goals match the needs or problems that are being addressed? How will changes be measured?

Feasibility and Efficiency: Is the proposed approach practical; has it been tried elsewhere? Are the budget and timeframe realistic?

Impact: What will happen as a result of the project? How will it make a difference in the industry?

Sustainability: Are there lasting benefits after the end of the project? What are the key partnerships? Have funds from other sources been identified? How will the project continue after the funding? *Note: Proposals that show collaborative efforts between Specialty Crop commodities may be scored higher.*

A panel selected by the Commissioner of the Texas Department of Agriculture shall review and make funding recommendations to the Commissioner.

Award Information and Notification. TDA will select projects to be included in the State plan submitted to AMS, USDA for funding. Selected projects may be asked to provide more detailed information regarding the scope of work, measurable outcomes, implementation, or anticipated expenditures. Projects will begin only after USDA has made their official award notice.

TDA reserves the right to accept or reject any or all proposals submitted. TDA is under no legal or other obligation to execute a grant on the basis of a response submitted to this RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP.

The public announcements and written notifications will be made to all applicants and their affiliated agencies, organizations, or institutions. Favorable decisions will indicate the amount of award, duration of the grant, and any special conditions associated with the project.

Budget Information. Specialty Crop projects are paid on a cost reimbursement basis.

1. Eligible Expenses. Generally, expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible. Expenses must be properly documented with sufficient backup detail, including copies of invoices. Examples of eligible expenditures are:

a. Personnel costs - both salary and benefits;

b. Travel - domestic;

c. Travel - foreign. Foreign travel may be paid on a case-by-case basis. To be eligible for reimbursement, foreign travel shall be approved in advance by TDA;

d. Materials and direct operating expenses - equipment that costs less than $5,000 per unit, research and office supplies, postage, telecommunications, printing, etc.;

e. Equipment - nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more. Allowable equipment must be only special purpose equipment (equipment which is only used for research, scientific, or other technical activities, and must solely enhance the competitiveness of eligible specialty crops and the benefit the specialty crop industry);

f. Other expenses - any expenses that do not fall into the above categories;

g. Contracts - agreements made with other universities or private parties to perform a portion of the award; and

h. Indirect expenses - TDA limits reimbursable indirect expenses to 10% of the grant award.

2. Ineligible Expenses. Expenses that are prohibited by state or federal law are ineligible. Examples of these expenditures are:

a. Alcoholic beverages;

b. Entertainment;

c. Contributions, charitable or political;

d. Expenses falling outside of the contract period;

e. Expenses for expenditures not listed in the project budget; and

f. Expenses that are not adequately documented; and

g. Capital expenditures for general purpose equipment.

Reporting Requirement.

1. Quarterly Performance Reports must be completed by the grantee and submitted to TDA by deadlines stated in the grant agreement. These reports shall be in a narrative format from one (1) to three (3) pages in length and detail the accomplishments of the project objectives.

The Quarterly Performance report should include:

Activities performed;

Problems and delays; and

Future project plans.

2. The Final Performance Report is due sixty (60) days after the expiration or termination of the Grant Agreement, whichever occurs first.

The Final Report should include:

Project Summary: Provide a background for the initial purpose of the project;

Project Approach;

Goals And Outcomes Achieved;

Beneficiaries: Provide a description of the groups and other operations that benefited from the completion of this project's accomplishments; and

Lessons learned.

General Compliance Information.

1. Any delegation by the Grantee to a subcontractor regarding any duties and responsibilities imposed by the grant award shall be approved in advance by TDA and shall not relieve the Grantee of its responsibilities to TDA for their performance.

2. All grant awards are subject to the availability of appropriations and authorizations by the Agricultural Marketing Service, USDA and TDA.

3. Any information or documentation submitted to TDA as part of the project grant proposal is subject to disclosure under the Texas Public Information Act.

4. Awarded grant projects must remain in full compliance, or be subject to termination at the discretion of TDA.

5. While TDA attempts to observe the strictest confidence in handling the research proposals, it cannot guarantee complete confidentiality on any matters that lie beyond its control. The confidentiality of recipient's "proprietary data" so designated shall be strictly observed to the extent permitted by appropriate Texas laws, including the Texas Public Information Act. There shall be no restriction on the publication of research results except when taking into consideration effects of prior publication on possible subsequent patent and license to use copyrighted material.

6. Control of the ownership and disposition of all patentable products and inventories shall be agreed to by Grantee and TDA. A copy of the grantee's intellectual property policy should be made available to TDA upon request.

7. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the research project. Records shall be maintained for three (3) years after the completion of the research project or as otherwise agreed upon with TDA. TDA, USDA and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the research project at any time throughout the duration of the agreement and for three (3) years immediately following completion of the project. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA, USDA and the Texas State Auditor's Office reserve the right to inspect the research locations and to obtain from the research team full information regarding all project activities.

8. If the Grantee has a financial audit performed in any year during which Grantee receives funds from TDA, and if TDA requests information about the audit, the Grantee shall provide such information to TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

9. Grant awards to Texas institutions shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS012001.doc

Deadline for Submission of Responses. Complete applications with signature must be submitted to: Physical Address: Ms. Mindy Weth Fryer, Grants Specialist, Texas Department of Agriculture, 1700 North Congress, 11th Floor, Austin, Texas 78701. Mailing Address: Ms. Mindy Weth Fryer, Grants Specialist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

Fax: (888) 223-9048

In addition to the hard copy to be mailed, the Project Narrative Proposal must be submitted in a Microsoft Word document to email: grants@TexasAgriculture.gov.

All portions of the application must be received no later than 5:00 p.m. on Friday, March 18, 2011.

TDA will send an acknowledgement receipt by email indicating the response was received.

Assistance and Questions.

For questions regarding submission of the proposal and TDA documentation requirements, please contact Ms. Mindy Weth Fryer, Grants Specialist, at (512) 463-6908 or by email at grants@TexasAgriculture.gov.

For questions regarding project topics or cooperative projects with TDA, please contact Mr. Richard De Los Santos, Coordinator for Horticultural, Produce and Forestry, at (512) 463-7472 or by email at Richard.DeLosSantos@TexasAgriculture.gov.

ATTACHMENT 1

Definition of Specialty Crops. Specialty crops are defined by law as "fruits and vegetables, tree nuts, dried fruits and horticulture and nursery crops, including floriculture." The tables below list plants commonly considered fruits and tree nuts, vegetables, culinary herbs and spices, medicinal plants, and nursery, floriculture, and horticulture crops. Ineligible commodities are also listed.

This list is not intended to be all inclusive, but rather intended to give examples of the most common specialty crops. It will be updated as USDA gets new questions. Please refer to the USDA-AMS Web site to get the most current list (www.ams.usda.gov).

List of Plants Commonly Considered Fruits and Tree Nuts.

Almond, Apple, Apricot, Avocado, Banana, Blackberry, Blueberry, Breadfruit, Cacao, Cashew, Citrus, Cherimoya, Cherry, Chestnut (for nuts), Coconut, Coffee, Cranberry, Currant, Date, Feijou, Fig, Filbert (hazelnut), Gooseberry, Grape (including raisin), Guava, Kiwi, Litchi, Macadamia, Mango, Nectarine, Olive, Papaya, Passion fruit, Peach, Pear, Pecan, Persimmon, Pineapple, Pistachio, Plum (including prune), Pomegranate, Quince, Raspberry, Strawberry, Suriname cherry, Walnut

List of Plants Commonly Considered Vegetables.

Artichoke, Asparagus, Bean (Snap or green), Lima (Dry, edible), Beet table, Broccoli (including broccoli raab), Brussels sprouts, Cabbage (including Chinese), Carrot, Cauliflower, Celeriac, Celery, Chive, Collards (including kale), Cucumber, Eggplant, Endive, Garlic, Horseradish, Kohlrabi, Leek, Lettuce, Melon (all types), Mushroom (cultivated), Mustard and other greens, Okra, Pea (Garden, English or edible pod), Onion, Opuntia, Parsley, Parsnip, Pepper, Potato, Pumpkin, Radish (all types), Rhubarb, Rutabaga, Salsify, Spinach, Squash (summer and winter), Sweet corn, Sweet potato, Swiss chard, Taro, Tomato (including tomatillo), Turnip, Watermelon

List of Commonly Considered Nursery, Floriculture, and Horticulture Crops.

Christmas Trees, Cut Flowers, Honey Maple Syrup, Hops, Turfgrass Sod, Tea Leaves

List of Plants Commonly Considered Culinary Herbs and Spices.

Ajwain, Allspice, Angelica, Anise, Annatto, Artemisia (all types), Asafetida, Basil (all types), Bay (cultivated), Bladder wrack, Bolivian coriander, Borage, Calendula, Chamomile, Candlenut, Caper, Caraway, Cardamom, Cassia, Catnip, Chervil, Chicory, Cicely, Cilantro, Cinnamon, Clary, Cloves, Comfrey, Common rue, Coriander, Cress, Cumin, Curry, Dill, Fennel, Fenugreek, Filé (gumbo, cultivated), Fingerroot, French sorrel, Galangal, Ginger, Hops, Horehound, Hyssop, Lavender, Lemon balm, Lemon thyme, Lovage, Mace, Mahlab, Malabathrum, Marjoram, Mint (all types), Nutmeg, Oregano, Orris root, Paprika, Parsley, Pepper, Rocket (arugula), Rosemary, Rue, Saffron, Sage (all types), Savory (all types), Tarragon, Thyme, Turmeric, Vanilla, Wasabi, Watercress

List of Plants Commonly Considered Medicinal Herbs.

Artemisia, Arum, Astragalus, Boldo, Cananga, Comfrey, Coneflower, Ephedra, Fenugreek, Feverfew, Foxglove, Gingko biloba, Ginseng, Goat's rue, Goldenseal, Gypsywort, Horehound, Horsetail, Lavender, Yerba buena, Liquorice, Marshmallow, Mullein, Passionflower, Patchouli, Pennyroyal, Pokeweed, St. John's wort, Senna, Skullcap, Sonchus, Sorrel, Stevia, Tansy, Urtica, Witch hazel, Wood betony, Wormwood, Yarrow

List of Ineligible Commodities.

Alfalfa, Barley, Borage, Canola oil, Cotton, Cottonseed oil, Dairy products, Eggs, Field corn, Fish (marine or freshwater), Flaxseed, Hay, Livestock products, Millet, Mustard seed oil, Oats, Peanut oil, Peanuts, Primrose, Rapeseed oil, Range grasses, Rice, Rye, Safflower oil, Shellfish (marine or freshwater), Sorghum, Soybean oil, Soybeans, Sugar beets, Sugarcane, Sunflower oil, Tobacco, Tofu, Wheat, Wild rice.

TRD-201007113
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 15, 2010

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Request for Proposals: Food and Fibers Research Grant Program

Statement of Purpose.

The Texas Department of Agriculture (TDA) is requesting proposals for projects for the Food and Fibers Research Grant Program (FFRGP). The FFRGP is administered by TDA under the direction of the Food and Fibers Research Council (Council). The purpose of this program is to provide a vehicle for the Texas fibers and oilseeds industries to facilitate and support applied research in Texas by engaging in surveys, research, and investigations relating to the use of cotton fiber, cottonseed, oilseed products, other products of the cotton plant, wool, mohair, and other textile products. Funded projects are expected to yield applicable results within 1-6 years.

Submission Dates/Locations.

Forms required for submitting a proposal are available by accessing TDA's website at: www.TexasAgriculture.gov, or by e-mailing the FFRGP at: Grants@TexasAgriculture.gov. One hard copy and one electronic copy of the proposal in Microsoft Word format must arrive no later than 5:00 p.m. on **Friday, April 1, 2011** to one of the following:

Physical Address: Texas Department of Agriculture Food and Fibers Research Grant Program, Attn: Lindsay Dickens, 1700 N. Congress Avenue, 11th Floor, Austin, TX 78701; or

Mailing Address: Texas Department of Agriculture, Food and Fibers Research Grant Program, Attn: Lindsay Dickens, P.O. Box 12847, Austin, TX 78711.

The electronic copy should be e-mailed to Grants@TexasAgriculture.gov.

Eligibility.

Grant proposals will be accepted from any state-supported university, state agency, or federal agricultural agency located in the State of Texas.

Funding Areas.

All proposals must meet at least one topical area listed below:

1. Cotton research related to cotton production, quality, and processing such as breeding, harvesting, pest and disease control, ginning or storing;

2. Sheep and goat research related to wool and mohair production, quality, and processing;

3. Oilseed and nutrition research related to production, quality, processing, and consumption such as plant breeding, harvesting, extraction, and utilization as a food or biofuel. Oilseeds include but are not limited to cottonseed, peanut and sunflower seeds;

4. Textile and natural fibers research related to cotton, wool, and mohair such as fiber characteristic testing, textile production, quality improvement, functionalization and utilization; and

5. Texas Agricultural Research Database continued production, maintenance, upgrades and expansions.

Proposal Requirements.

Funding Parameters: It is anticipated that most projects will be funded in a range of $15,000 - $40,000 per year. Projects that exceed this range must have strong justification and a potential for providing significant, demonstrable benefits to Texas agriculture. Projects will be awarded for **two years (September 1, 2011 - August 31, 2013).** Projects may be re-submitted in subsequent years for continued funding.

TDA reserves the right to fund proposals partially or fully. Where more than one proposal on an eligible research topic is acceptable for funding, TDA may request cooperation between grantees or revision/adjustment to a proposal in order to avoid duplication and to realize the maximum benefit to the state.

Form Requirements:

Proposals must be submitted on form FF-100 for consideration.

The required forms are available by accessing TDA's website at www.TexasAgriculture.gov or by e-mailing the FFRGP at: Grants@TexasAgriculture.gov.

Technical Requirements:

Include the following items:

1. **Personnel/Contact Information - Do Not Exceed Two Pages.** Include title, performing institution, principal investigator's contact information and experience, responsible contracts officer's information, and cooperating investigators and their experience.

2. **Proposal Summary - Do Not Exceed 200 Words.** Briefly summarize the research for which you are requesting funding.

3. **Research Proposal - Do Not Exceed Three Pages.** Include the following:

A. Background - Statement of the research problem and its general background;

B. Objectives - Concise outline of specific, feasible research objectives;

C. Research Plan - Strategies, procedures, and methodologies used in addressing the questions asked; and

D. Commercialization/Benefits - Description of the expected results and their anticipated contributions to agriculture in Texas, including the potential for technology transfer and commercialization.

4. **Performance and Budget Information.** Include the following:

A. Published Reports - Estimated number of reports that will be published or presented during the funding period;

B. Project Budget - Include categories of Salary, Travel, Materials and Operating Expenses, Equipment, Other, Contracts, and Indirect (not to exceed 10%). Round budget items to the nearest $100;

C. Supporting and Leveraged Funds Table - The FFRGP does not have a specific supporting funds requirement, but a claim of supporting, leveraged or matching funds may be considered a positive factor in the review process.

To be considered, a short narrative explanation must be included with the application, indicating the source and amount of the additional funds. If funds have not yet been awarded or will be received at a future date, an indication that such funds are pending is required and an anticipated receipt date should be provided.

Funds must be documented on the budget submission form and reported on a quarterly basis; and

D. Indirect Costs - The FFRGP will allow 10% of the grant award amount to be used for the reimbursement of indirect costs. Additionally, up to 20% of the grant award amount may be claimed as Supporting Funds. See "C" above.

Budget Information:

FFRGP projects are paid on a cost reimbursement basis.

1. **Eligible Expenses.** Generally, expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible. Expenses must be properly documented with sufficient backup detail, including copies of invoices. Examples of eligible expenditures are:

A. Personnel costs - both salary and benefits;

B. Travel - domestic (Reimbursement for foreign travel is discouraged and must receive written approval prior to travel);

C. Materials and direct operating expenses - equipment that costs less than $5,000 per unit, research and office supplies, postage, telecommunications, printing, etc.;

D. Equipment - nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more; and

E. Other expenses - any expenses that do not fall into the above categories;

F. Contracts - agreements made with other universities or private parties to perform a portion of the award; and

G. Indirect expenses - the FFRGP limits reimbursable indirect expenses to 10% of the grant award.

2. **Ineligible Expenses.** Expenses that are prohibited by state or federal law are ineligible. Examples of these expenditures are:

A. Alcoholic beverages;

B. Entertainment;

C. Contributions, charitable or political;

D. Expenses falling outside of the contract period;

E. Expenses for expenditures not listed in the project budget; and

F. Expenses that are not adequately documented.

3. **Description of the Budget.** Present an overall project budget and include the following items in the budget description:

A. Personnel services: Grant funds may be used for directly supporting salaries and wages of investigators, co-investigators, graduate, and technical assistants. Support personnel can receive salaries and social/fringe benefits in proportion to the time devoted to the research project.

B. Travel: Grant funds used for travel expenses, domestic or foreign, must be limited to the State of Texas established mileage, per diem, and lodging policies. Reimbursement for foreign travel is discouraged, but may be paid on a case-by-case basis. To be eligible for reimbursement, foreign travel shall be approved in advance by the Commissioner or his designee.

C. Materials and Direct Operating Expenses: Expenses that are directly related to the grantee's day-to-day operation of the grant project that are not included in any of the Grantee's other standard budget categories and have an acquisition cost of less than $5,000 per unit. Grantees must allocate costs on a prorated basis for shared usage, including research and office supplies, postage, telecommunications, and printing.

D. Equipment: Defined as tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. Applicants must submit with their grant applications a list of all proposed equipment purchases for approval. Grantees are not authorized to purchase any equipment until they have received written approval to do so from the Commissioner or his designee through the original grant award or a subsequent grant adjustment notice. The FFRGP may refuse any request for equipment. Decisions regarding equipment purchases are made based on whether or not the grantee has demonstrated that the requested equipment is necessary, essential to the successful operation of the grant project, and reasonable in cost. Equipment purchased with FFRGP funds remains the property of TDA and is subject to TDA inventory reporting requirements.

E. Professional/Contractual: Any contract or agreement entered into by a grantee and a third party that obligates grant funds must be in writing and consistent with Texas law. Grantees must maintain adequate documentation supporting budget items for a contractor's time, services, and rates of compensation.

F. Indirect Expenses: Grant funds may be used for indirect costs up to 10% of the grant award amount.

G. Supporting/Leveraged Funds: The FFRGP is required by the Texas Legislature to report the leveraged funds its projects receive. These leveraged funds include other grants for the same or related projects, in-kind contributions of salary, materials, and/or equipment usage, and overhead attributable to the project (up to 20% of the grant award). Quarterly reports listing leveraged funds will be required throughout the year detailing the source and amount.

H. Additional Budget Information: Provide any additional information you think would be helpful to the review committee including equipment justification, subcontract recipients and amounts, list of key personnel to be paid, or description of other large item expenditures.

Evaluation of Proposals.

One or more review panels may evaluate the proposals, including the Council.

The proposals will be evaluated on the following elements:

1. the scientific and technological merit of the proposal;

2. the potential of meeting the applied research requirement with expected application of useful results for agriculture within 1-6 years of the project's initiation;

3. the feasibility of the objectives;

4. the anticipated benefits to agriculture and the environment in Texas;

5. the potential for the research to be commercialized;

6. the requested budget in relation to the research plan; and

7. the ability to leverage additional funds.

Award Information and Notification.

The Council will approve projects for funding by the FFRGP. The FFRGP reserves the right to accept or reject any or all proposals submitted. TDA and the Council are under no legal or other obligation to execute a grant on the basis of a submitted RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP.

The public announcements and written notifications will be made to all applicants and their affiliated research institution. Favorable decisions will indicate the amount of award, duration of the grant, and any special conditions associated with the project.

General Compliance Information.

1. Prior to accepting the research grant and signing the grant agreement, researchers will be provided a copy of the TDA reporting requirements for their review. This document will explain billing procedures, quarterly and annual reporting requirements, procedures for requesting a change in the project scope or budget, and other miscellaneous items.

2. Any delegation by the Grantee to a subcontractor regarding any duties and responsibilities imposed by the grant award shall be approved in advance by TDA and shall not relieve the Grantee of its responsibilities to TDA for their performance.

3. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature, TDA and the Council.

4. Any information or documentation submitted to TDA as part of the project grant proposal is subject to disclosure under the Texas Public Information Act.

5. While FFRGP attempts to observe the strictest confidence in handling the research proposals, it cannot guarantee complete confidentiality on any matters that lie beyond its control. The confidentiality of recipient's "proprietary data" so designated shall be strictly observed to the extent permitted by appropriate Texas laws, including the Texas Public Information Act. There shall be no restriction on the publication of research results except when taking into consideration effects of prior publication on possible subsequent patent and license to use copyrighted material.

6. Control of the ownership and disposition of all patentable products and inventories shall be agreed to by Grantee and TDA. A copy of the intellectual property policy should be made available to the FFRGP upon request.

7. Grant recipients must submit information on their funded project to the Texas Agricultural Research Database.

8. Awarded grant projects must remain in full compliance with state and federal laws and regulations. Noncompliance with such law may result in termination by TDA.

9. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the research project. Records shall be maintained for three years after the completion of the research project or as otherwise agreed upon with TDA. TDA and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the research project at any time throughout the duration of the agreement and for three years immediately following completion of the project. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA and the Texas State Auditor's Office reserve the right to inspect the research locations and to obtain from the research team full information regarding all project activities.

10. If the Grantee has a financial audit performed in any year during which Grantee receives funds from Grantor, and if the Grantor requests information about the audit, the Grantee shall provide such information to TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

11. Grant awards to Texas institutions shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/U GMS012001.doc

12. Grant management guidelines for FFRGP grants will be published under separate cover.

For any questions: Please contact Ms. Lindsay A. Dickens, Grants Specialist, at (512) 463-6695 or by e-mail at: grants@TexasAgriculture.gov.

TRD-201007016
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 10, 2010

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Office of the Attorney General

Request for Proposal

This Request for Proposal is filed pursuant to Texas Government Code §2254.021 *et seq.*

The Office of the Attorney General of Texas (the OAG) requests that professional consultants with documented expertise and experience in the field of indirect cost recovery and cost allocation plans for governmental units submit proposals to prepare Indirect Cost Plans for State Fiscal Years 2010 (FY10) (based on actual expenditures) and 2012 (FY12) (based on budgeted expenditures) and to analyze and update standardized billing rates for legal services provided by the OAG. In accordance with Texas Government Code §2254.029(b), the OAG hereby discloses that similar services related to indirect cost plans and legal billing rates covering earlier fiscal years have been previously provided to the OAG by a consultant.

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. Currently, the OAG is recouping its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services (HHS).

The OAG also provides legal services to other state agencies. The consultant selected will be responsible for analyzing the existing billing rates and actual costs and then updating the legal services rates for use in FY12.

The consultant selected to prepare the Indirect Cost Plans and to develop current, standardized legal billing rates must demonstrate the necessary qualifications and experience listed in the "QUALIFICATIONS" section. The successful consultant will also be required to perform the services and generate the reports listed in the "SCOPE OF SERVICES" section. The acceptance of a proposal by the OAG, made in response to this Request for Proposal, will be based on the OAG's evaluation of the competence, knowledge, and qualifications

of the consultant, in addition to the reasonableness of the proposed fee for services. If other considerations are equal, the OAG will give preference to a consultant whose principal place of business is in Texas or who will manage the consulting contract wholly from an office in Texas. The total contract award will not exceed Forty-Nine Thousand and NO/100 Dollars($49,000.00).

SCOPE OF SERVICES

The successful consultant will be required to render the following services and reports:

1. Prepare two (2) Indirect Cost Plans in accordance with OMB Circular A-87 - one based on FY10 actual expenditures and one based on FY12 budgeted expenditures:

* Identify the sources of financial information;

* Inventory all federal and other programs administered by the OAG;

* Classify all OAG divisions;

* Determine administrative divisions;

* Determine allocation bases for allotting services to benefitting divisions;

* Develop allocation data for each allocation base;

* Prepare allocation worksheets based upon actual FY10 expenditures and budgeted FY12 expenditures;

* Summarize costs by benefitting division;

* Collect cost data for all of the programs included in the inventory of federal and other programs administered by the OAG;

* Determine indirect cost rates throughout the OAG on an annual basis;

* Prepare and present draft Indirect Cost Plans to the OAG by April 8, 2011;

* Formalize the Actual FY10 and Budgeted FY12 Indirect Cost Plans and present them to HHS by April 29, 2011; and

* Negotiate the Indirect Cost Plans - approval with HHS by August 31, 2011.

2. Develop standardized billing rates for legal services:

* Review current criteria used by the OAG for charging various agencies;

* Determine the types of legal services provided to the agencies;

* Compile direct hours for each type of service;

* Determine effort reporting requirements;

* Re-examine billing rate options;

* Determine the actual cost of services;

* Analyze and confirm revenues and cost analyses;

* Prepare and present a draft Legal Services Billing Schedule for FY 2010 actual costs and FY 2012 budgeted costs to the OAG by July 29, 2011;

* Formalize a Legal Services Billing Schedule by August 31, 2011.

The selected consultant will accumulate and analyze all data that are required. The OAG is not expected to provide any staff resources to the selected consultant. The OAG will provide a liaison with staff within the OAG and with other state agencies, as appropriate.

QUALIFICATIONS

Each individual, company, or organization submitting a proposal pursuant to this request, must present evidence or otherwise demonstrate to the satisfaction of the OAG that such entity:

1. Has the experience to prepare and successfully negotiate the type of Indirect Cost Plan described above;

2. Has a thorough understanding of cost allocation issues and preparation of Indirect Cost Plans at the state agency level;

3. Has a thorough understanding of legal services billing procedures and preparation of a Legal Services Billing Schedule; and

4. Can program and execute the Indirect Cost Plans and Legal Services Billing Schedule within the required time frames specified in the "SCOPE OF SERVICES" section.

Please provide evidence of the above qualifications and a proposal which includes:

1. A detailed description of the plan of action to fulfill the requirements described in the "SCOPE OF SERVICES" section;

2. Detailed information on the consultant staff to be assigned to the project; and

3. The proposed fee amount for provision of the desired services.

A signed original and five (5) copies of the proposal must be received in the OAG Purchasing Section, 300 West 15th Street, Third Floor, Austin, Texas 78701, no later than 3:00 p.m., Central Standard Time, January 24, 2011. Any proposal received after the specified time and date will not be given consideration. Conditioned on the OAG's receipt of the requisite finding of fact from the Governor's Budget and Planning Office pursuant to Texas Government Code §2254.028, the OAG anticipates entering into the resultant contract on or about February 8, 2011.

A proposal must include all of the references and financial status information as specified below at the time of opening or it will be disqualified. Proposals should be sealed and clearly marked with the specified time and date and the title, "Proposal for Consulting Services for an Indirect Cost Recovery/Cost Allocation Plan and Legal Services Billing Schedule for the OAG".

REFERENCES AND FINANCIAL CONDITION

Prospective consultants will provide the names of at least three (3) different references meeting the following criteria:

1. The reference company or entity must have engaged the prospective consultant for the same or similar services as those to be provided in accordance with the terms of this Request for Proposal;

2. The services must have been provided by the prospective consultant to the reference company or entity within the five (5) years preceding the issuance of this Request for Proposal;

3. The reference company or entity must not be affiliated with the prospective consultant in any ownership or joint venture arrangement;

4. References must include the company or entity name, address, contact name, and telephone number for each reference. The OAG may not be used as a reference. The contact name must be the name of a senior representative of the reference company or entity who was directly responsible for interacting with the prospective consultant throughout the performance of the engagement and who can address questions about the performance of the prospective consultant from personal experience. References will accompany the proposal.

5. The prospective consultant will provide a signed release from liability for each reference provided in response to this requirement. The release from liability will absolve the specified reference company or

entity from liability for information provided to the OAG concerning the prospective consultant's performance of its engagement with the reference.

6. The prospective consultant must disclose if and when it has filed for bankruptcy within the last seven (7) years. For prospective consultants conducting business as a corporation, partnership, limited liability partnership, or other form of artificial person, the prospective consultant must disclose whether any of its principals, partners, or officers have filed for bankruptcy within the last seven (7) years.

7. As part of any proposal submission, the prospective consultant must include information regarding financial condition, including income statements, balance sheets, and any other information which accurately shows the prospective consultant's current financial condition. The OAG reserves the right to request such additional financial information as it deems necessary to evaluate the prospective consultant, and by submission of a proposal, the prospective consultant agrees to provide same.

DISCLOSURE

Any individual who provides a proposal for consulting services in response to this Request for Proposal and who has been employed by the OAG or any other state agency(ies) at any time during the two (2) years preceding the tendering of the proposal will disclose in the proposal:

1. The nature of the previous employment with the OAG or any other state agency(ies);

2. The date(s) the employment(s) terminated; and

3. The annual rate(s) of compensation for the employment(s) at the time(s) of termination.

Each consultant that submits a proposal must certify to the following:

1. Consultant has no unresolved audit exceptions(s) with the OAG. An unresolved audit exception is an exception for which the consultant has exhausted all administrative and/or judicial remedies and refuses to comply with any resulting demand for payment.

2. Consultant certifies that the consultant's staff or governing authority has not participated in the development of specific criteria for award of this contract, and will not participate in the selection of consultant(s) awarded contracts.

3. Consultant has not retained or promised to retain an agent or utilized or promised to utilize a consultant who has participated in the development of specific criteria for the award of contract, nor will participate in the selection of any successful consultant.

4. Consultant agrees to provide information necessary to validate any statements made in consultant's response, if requested by the OAG. This may include, but is not limited to, granting permission for the OAG to verify information with third parties, and allowing inspection of consultant's records.

5. Consultant understands that failure to substantiate any statements made in the response when substantiation is requested by OAG may disqualify the response, which could cause the consultant to fail to receive a contract or to receive a contract for an amount less than that requested.

6. Consultant certifies that the consultant's organization has not had a contract terminated or been denied the renewal of any contract for noncompliance with policies or regulation of any state or federal funded program within the past five years nor is it currently prohibited from contracting with a government agency.

7. Consultant certifies that its Corporate Texas Franchise Tax payments are current, or that it is exempt from or not subject to such tax.

8. Consultant has not given nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.

9. Neither the consultant nor the firm, corporation, partnership or institution represented by the consultant, anyone acting for such firm, corporation partnership or institution has violated the antitrust laws of this State, the Federal antitrust laws nor communicated directly or indirectly its response to any competitor or any other person engaged in such line or business.

10. Under Family Code §231.006 (relating to child support), the consultant certifies that the individual or business entity named in this response is not ineligible to receive a specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

11. If the consultant is an individual not residing in Texas or a business entity not incorporated in or whose principal domicile is not in Texas, the consultant certifies that it either: (a) holds a permit issued by the Texas Comptroller to collect or remit all state and local sales and use taxes that become due and owing as a result of the consultant's business in Texas; or (b) does not sell tangible personal property or services that are subject to the state and local sales and use tax.

12. Consultant certifies that if a Texas address is shown as the address of the vendor, vendor qualifies as a Texas Bidder as defined in 34 TAC 20.32(68).

13. Consultant certifies that it has not received compensation for participation in the preparation of the specifications for this solicitation.

14. Consultant must answer the following questions:

If an award is issued, do you plan to utilize a subcontractor or supplier for any portion of the contract? If consultant plans to utilize a subcontractor, the subcontractor will comply with the same terms as the consultant as contained in this solicitation and other relevant OAG policy and procedure and the subcontractor must be approved in advance by OAG.

If yes, what percentage of the total award would be subcontracted or supplied by Historically Underutilized Businesses (HUBs)?

If no, explain why no subcontracting opportunities are available or what efforts were made to subcontract part of this project.

Is consultant certified as a Texas HUB?

PAYMENT

Payment for services will be made upon receipt of invoices presented to the OAG in the form and manner specified by the OAG after certification of acceptance of all deliverables.

PROPOSAL PREPARATION AND CONTRACTING EXPENSES

All proposals must be typed, double spaced, on 8 1/2" x 11" paper, clearly legible, with all pages sequentially numbered and bound or stapled together. The name of the prospective consultant must be typed at the top of each page. Do not attach covers, binders, pamphlets, or other items not specifically requested.

A Table of Contents must be included with respective page numbers opposite each topic. The proposal must contain the following completed items in the following sequence:

1. Transmittal Letter: A letter addressed to Ms. Julie Geeslin (address at the end of this Request for Proposal) that identifies the person or entity submitting the proposal and includes a commitment by that per-

son or entity to provide the services required by the OAG. The letter must state, "The proposal enclosed is binding and valid at the discretion of the OAG." The letter must specifically identify the project for this proposal. The letter must include "full acceptance of the terms and conditions of the Request for Proposal." Any exceptions to the Request for Proposal must be specifically noted in the letter. However, any exceptions to the terms and conditions of the Request for Proposal or subsequently negotiated contract may disqualify the Consultant from further consideration at the OAG's discretion.

2. Executive Summary: A summary of the contents of the proposal, excluding cost information. Address services that are offered beyond those specifically requested as well as those offered within specified deliverables. Explain any missing or other requirements not met, realizing that failure to provide necessary information or offer required service deliverables may result in disqualification of the proposal.

3. Project Proposal.

4. Cost Proposal.

5. Relevant Technical Skill Statement (with references and vitae).

6. Relevant Experience Statement (with references and vitae).

To be considered responsive, a proposal must set forth full, accurate, and complete information as required by this request. A non-responsive proposal will not be considered for further evaluation. If the requirement that is not met is considered a minor irregularity or an inconsequential variation, an exception may be made at the discretion of the OAG and the proposal may be considered responsive.

A written request for withdrawal of a proposal is permitted any time prior to the submission deadline and must be received by Ms. Julie Geeslin (address at the end of this Request for Proposal). After the deadline, proposals will be considered firm and binding offers at the option of the OAG.

Preliminary and final negotiations with top-ranked prospective consultants may be held at the discretion of the OAG. The OAG may decide, at its sole option and in its sole discretion, to negotiate with one, several, or none of the prospective consultants submitting proposals pursuant to this request. During the negotiation process, the OAG and any prospective consultant(s) with whom the OAG chooses to negotiate, may adjust the scope of the services, alter the method of providing the services, and/or alter the costs of the services so long as the changes are mutually agreed upon and are in the best interest of the OAG. Statements made by a prospective consultant in the proposal packet or in other appropriate written form will be binding unless specifically changed during final negotiations. A contract award may be made by the OAG without negotiations if the OAG determines that such an award is in the OAG's best interest.

All prospective consultants of record will be sent written notice of which, if any, prospective consultant(s) is selected for the contract award on or about February 14, 2011 or within ten (10) days of making an award, whichever is later.

All proposals are considered to be public information subsequent to an award of the contract. All information relating to proposals will be subject to the Public Information Act, Texas Government Code Annotated, Chapter 552, after the award of the contract. All documents will be presumed to be public unless a specific exception in that Act applies. Prospective consultants are requested to avoid providing information which is proprietary, but if it is necessary to do so, proposals must specify the specific information which the prospective consultant considers to be exempted from disclosure under the Act and those pages or portions of pages which contain the protected information must be clearly marked. The specific exemption which the prospective consultant believes protects that information must be cited. The OAG will assume that a proposal submitted to the OAG contains no proprietary or confidential information if the prospective consultant has not marked or otherwise identified such information in the proposal at the time of its submission to the OAG.

Pursuant to Texas Government Code §§411.127 - 411.1271, the OAG may elect to obtain criminal history information from the Texas Department of Public Safety, the Federal Bureau of Investigation, or another law enforcement agency about any person or employee of an entity that proposes to enter into a contract, or who has entered a contract, to supply goods and services to the agency. This authorization includes subcontractors and their employees. If requested, the vendor shall provide identifying data necessary to facilitate the performance of initial and periodic criminal background checks on its employees and the employees of any subcontractor. In its sole discretion, the OAG may reject the assignment or restrict the access of personnel on the basis of reported criminal history and is prohibited by law from disclosing the results of any criminal background check to the vendor.

The OAG has sole discretion and the absolute right to reject any and all offers, terminate this Request for Proposal, or amend or delay this Request for Proposal. The OAG will not pay any cost incurred by a prospective consultant in the preparation of a response to this Request for Proposal and such costs will not be included in the budget of the prospective consultant submitted pursuant to this Request for Proposal. The issuance of this Request for Proposal does not constitute a commitment by the OAG to award any contract. This Request for Proposal and any contract which may result from it are subject to appropriation of State and Federal funds and the Request for Proposal and/or contract may be terminated at any time if such funds are not available.

The OAG reserves the right to accept or reject any or all proposals submitted in response to this request and to negotiate modifications necessary to improve the quality or cost effectiveness of any proposal to the OAG. The OAG is under no legal obligation to enter into a contract with any offeror of any proposal on the basis of this request. The OAG intends any material provided in this Request for Proposal only and solely as a means of identifying the scope of services and qualifications sought.

The State of Texas assumes no responsibility for expenses incurred in the preparation of responses to this Request for Proposal. All expenses associated with the preparation of the proposal solicited by this Request for Proposal will remain the sole responsibility of the prospective consultant. Further, in the event that the prospective consultant is engaged to provide the services contemplated by this Request for Proposal, any expenses incurred by the prospective consultant associated with the negotiation and execution of the contract for the engagement will remain the obligation of the consultant.

Please address responses to:

Ms. Julie Geeslin

Budget and Purchasing Division

Office of the Attorney General of Texas

300 W. 15th Street, Third Floor

Austin, Texas 78701

Phone: (512) 475-4495

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201007104

Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 14, 2010

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Cancer Prevention and Research Institute of Texas

Request for Applications P-11-CPMG2 Cancer Prevention Microgrants

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose programs in the area of A) tobacco prevention and control or B) increasing delivery of primary preventive services for all cancers and screening services for breast, cervical and colorectal cancers. The purpose of this grant mechanism is to support organizations proposing innovative, evidence-based strategies in areas of the State that have populations with great need or high incidence and/or mortality rates, but lack the infrastructure to carry out prevention programs or services that are larger in scope. For Microgrants, CPRIT will consider measurable outcomes on a project-specific basis.

Successful applicants are eligible for a grant award of up to $150,000 in direct costs for up to 24 months. A request for applications titled Cancer Prevention Microgrants is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. CST on January 13, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. CST on Tuesday, March 22, 2011. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201007116
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: December 15, 2010

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Request for Applications P-11-EBP2 Evidence-Based Cancer Prevention Services

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose to deliver evidence-based services in at least one of the following cancer prevention and control areas: 1) Primary cancer prevention (e.g. vaccine-conferred immunity, healthy diet, avoidance of alcohol misuse, physical activity, sun protection); 2) Secondary prevention (e.g., screening/early detection for breast, cervical, and/or colorectal cancer); or 3) Tertiary prevention (e.g., survivorship services such as physical rehabilitation/therapy, psychosocial interventions, navigation services, palliative care). CPRIT expects measurable outcomes of supported activities.

Successful applicants are eligible for a grant award of up to $3 million in direct costs for up to 36 months. Applicant budget requests for funding will vary depending on the project, and it is anticipated that the majority of applicants will request significantly less than the maximum. A request for applications titled Evidence-Based Cancer Prevention Services is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. CST on January 13, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. CST on Tuesday, March 22, 2011. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201007115
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: December 15, 2010

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Request for Applications P-11-PPE2 Health Behavior Change Through Public and Professional Education and Training

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose health care professional education and training and/or health promotion, education, and outreach for prevention, early detection, and survivorship of cancer for the public that, if successful, would improve the practice and performance of health care practitioners and increase the number of persons who improve their health behaviors related to the prevention of cancer, obtain recommended cancer screening tests, have cancers detected at earlier stages, and improve their quality of life if they are survivors of cancer. CPRIT expects measurable outcomes of supported activities.

Successful applicants proposing either public education or professional education are eligible for a grant award of up to $300,000 in direct costs for up to 24 months. Successful applicants proposing both public and professional education are eligible for a grant award of up to $600,000 in direct costs for up to 24 months. A request for applications titled Health Behavior Change Through Public and Professional Education and Training is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. CST on January 13, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. CST on Tuesday, March 22, 2011. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201007117
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: December 15, 2010

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of November 29, 2010, through December 3, 2010. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period

extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on December 15, 2010. The public comment period for this project will close at 5:00 p.m. on January 14, 2011.

FEDERAL AGENCY ACTIONS:

Applicant: National Seafoods; Location: The project is located at the Palm Street Grill Restaurant located along the Laguna Madre in South Padre Island, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Isabel, Texas. Approximate UTM Coordinates in NAD 83(meters): Zone 14; Easting: 683161.73; Northing: 2887757.39. Project Description: The U.S. Army Corps of Engineers (Corps) has made a decision to accept an after-the-fact permit application for the above listed project in order to bring all existing and future structures into compliance under Section 10 of the Rivers and Harbors Act. The original permit was issued to a separate party in 1982 and several structures, both authorized and unauthorized, have been constructed at the site by several different owners since that time. The current property owner, National Seafoods, proposes to authorize all existing structures under a Department of the Army permit and is also proposing to construct additional structures at the site. Existing structures include a 75-foot x 20-foot dock, an 18-foot x 8-foot walkway to the dock, a 78-foot x 10-foot floating concrete dock, and a 20-foot x 12-foot floating jet-ski ramp. Proposed structures include an 80-foot x 10-foot platform, a 27-foot x 8-foot walkway, and a 28-foot x 20-foot proposed dock addition. No mitigation is being proposed in association with this project. CMP Project No.: 11-0202-F1. Type of Application: U.S.A.C.E. permit application #SWG-2003-01946 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Ms. Kate Zultner, Consistency Review Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201007072
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 13, 2010

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Comptroller of Public Accounts

Local Sales Tax Rate Change Effective January 1, 2011

The 1/4 percent city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will be abolished, effective January 1, 2011, in the city listed below.

CITY NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Progreso (Hidalgo Co)	2108181	.017500	.080000

The 1/2 percent special purpose district sales and use tax will be **abolished** effective January 1, 2011 in the Special Purpose Districts listed below.

SPD NAME	LOCAL CODE	LOCAL RATE
Cherokee County Development District No. 1	5037506	

TRD-201006979
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: December 8, 2010

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Notice of Award

The Comptroller of Public Accounts (Comptroller) announces this notice of award for consulting services for the Texas Prepaid Higher Education Tuition Board under Request for Proposals (RFP) 198a. The RFP was published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3877).

The contract was awarded to AKF Consulting, LLC dba AKF Consulting Group, 186 Riverside Drive, Suite 600, New York, NY0 10024. The total amount of the contract is not to exceed $100,000.00. The term of the contract is December 10, 2010 through December 31, 2012, with option to renew for two (2) additional one (1) year terms, one year at a time.

TRD-201007078
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 13, 2010

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Notice of Legal Banking Holidays

Texas Tax Code §111.053(b) requires that, before January 1 of each year, the Comptroller of Public Accounts publish a list of the legal holidays for banking purposes for that year. This is the 2011 Eleventh District Holiday Schedule. Pursuant to the Federal Reserve Bank of Dallas Notice 10-37 dated July 15, 2010, the Federal Reserve Bank of

Dallas and its branches at El Paso, Houston, and San Antonio, Texas, will not be open on the following holidays:

Monday, January 17, Martin Luther King, Jr. Day

Monday, February 21, Presidents Day

Monday, May 30, Memorial Day

Monday, July 4, Independence Day

Monday, September 5, Labor Day

Friday, November 11, Veterans Day

Thursday, November 24, Thanksgiving Day

Monday, December 26, Christmas

The Federal Reserve standard holiday schedule mandates that if January 1, July 4, November 11, or December 25 falls on a Sunday, the following Monday will be observed as a holiday. If January 1, July 4, November 11, or December 25 occurs on a Saturday, the preceding Friday will not be observed as a holiday. For the year 2010, July 4 occurs on a Sunday; therefore, the following Monday will be observed as a holiday.

For 2011, January 1 occurs on a Saturday; therefore, the preceding Friday will not be observed as a holiday. Also, December 25 occurs on a Sunday; therefore, the following Monday will be observed as a holiday.

TRD-201007025
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 10, 2010

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/20/10 - 12/26/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/20/10 - 12/26/10 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201007080
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 13, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 24, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 24, 2011.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: American Water Operations and Maintenance, Inc.; DOCKET NUMBER: 2010-1558-WQ-E; IDENTIFIER: RN105671531; LOCATION: Fort Hood, Bell County; TYPE OF FACILITY: domestic and industrial wastewater collection system; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent the discharge of untreated wastewater; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: City of Avinger; DOCKET NUMBER: 2010-1610-PWS-E; IDENTIFIER: RN101387033; LOCATION: Avinger, Cass County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 Texas Administrative Code (TAC) §290.46(q)(1) and Texas Health and Safety Code (THSC), §341.033(b), by failing to issue a boil water notification within 24 hours; and 30 TAC §290.46(e)(2)(A), by failing to ensure that the repaired distribution facilities were placed back into service with the prior guidance and approval of a licensed water works operator; PENALTY: $630; ENFORCEMENT COORDINATOR: Kelly Wisian, (512) 239-2570; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: BACK PORCH BAR-B-Q, INC.; DOCKET NUMBER: 2010-1509-PWS-E; IDENTIFIER: RN105970867; LOCATION: Victoria County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.42(b)(1), by failing to provide disinfection facilities for microbiological control and distribution protection; and 30 TAC §290.39(e)(1) and (m) and THSC, §341.035(c), by failing to provide written notification to the commission of the startup of a new PWS and by failing to submit engineering plans and specifications for a new PWS system; PENALTY: $850; ENFORCEMENT COORDINATOR: Katy Schuman, (512) 239-2602; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: Budget Rent A Car System, Inc.; DOCKET NUMBER: 2010-1600-PST-E; IDENTIFIER: RN102779543; LOCATION:

Houston, Harris County; TYPE OF FACILITY: rental car facility with gasoline refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) in a manner which will detect a release; PENALTY: $2,250; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: CEMEX Construction Materials South, LLC; DOCKET NUMBER: 2010-1411-IWD-E; IDENTIFIER: RN105628077; LOCATION: Houston, Harris County; TYPE OF FACILITY: ready-mix concrete plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXG110925, Part III, Permit Requirements Section A. from Outfall Numbers 001, 002, and 003, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for pH and total suspended solids (TSS); 30 TAC §§305.125(1), 319.1, and 319.7(d) and TPDES General Permit Number TXG110925, Part IV Standard Permit Conditions Number 7(f), by failing to provide monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and §319.7(d) and TPDES General Permit Number TXG110925, Part III Whole Effluent Toxicity Testing for Discharges Into Fresh Receiving Streams and Part IV Standard Permit Conditions Number 7(f), by failing to submit the discharge monitoring report (DMR) for the monitoring period ending December 31, 2009 for Outfall Number 001 and by failing to submit the annual toxicity report for the monitoring period ending January 31, 2010 for Outfall Numbers 001 and 002; PENALTY: $9,720; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Citgo Refining and Chemicals Company, L.P.; DOCKET NUMBER: 2009-1714-MLM-E; IDENTIFIER: RN102555166; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refinery with wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0000467000, Effluent Limitations and Monitoring Requirements Number 1, Outfall 001, and the Code, §26.121(a), by failing to meet the permitted effluent limit for fluoride at Outfall 001; 30 TAC §305.125(1), TPDES Permit Number WQ0000467000, Effluent Limitations and Monitoring Requirements Number 1, Outfall 004, and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater through Outfall 004; 30 TAC §305.125(1) and (8) and TPDES Permit Number WQ0000467000, Permit Conditions Number 2.e, by failing to obtain authorization from the commission prior to beginning an activity which resulted in non-compliance with a permit condition; 30 TAC §305.125(1), TPDES Permit Number WQ0000467000, Permit Conditions Number 2.g, and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of process wastewater into or adjacent to water in the state; and 30 TAC §116.115(b)(2)(F) and (c), Permit Number 3390A, Special Condition (SC) Number 1 and Permit Number 2708A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(b)(1)(G) and (H); and THSC, §382.085(b), by failing to submit an administratively complete final report for incident number 126966; PENALTY: $303,294; Supplemental Environmental Project (SEP) offset amount of $151,647 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 6300 Ocean Drive, Suite 2500, Corpus Christi, Texas 78412-5839, (316) 825-3100.

(7) COMPANY: Comal County; DOCKET NUMBER: 2010-1353-EAQ-E; IDENTIFIER: RN105504120; LOCATION: Comal County; TYPE OF FACILITY: sports park; RULE VIOLATED: 30 TAC §213.23(a)(1) and (i), by failing to obtain approval of a modification to an approved contributing zone plan prior to commencement of regulated activities; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: Landon K. Cruse; DOCKET NUMBER: 2010-1917-WOC-E; IDENTIFIER: RN104905468; LOCATION: Tarrant County; TYPE OF FACILITY: on-site sewage operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: E.I. Du Pont de Nemours and Company; DOCKET NUMBER: 2010-0839-MLM-E; IDENTIFIER: RN100542711; LOCATION: Orange, Orange County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), New Source Review (NSR) Permit Number 20204, SC Number 1, Federal Operating Permit (FOP) Number O-02055, General Terms and Conditions (GTC) and SC Number 8, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §§116.115(b)(2)(F) and (c), 122.143(4), and 335.221(a)(15), 40 Code of Federal Regulations (CFR) §266.104(b), FOP Number 1896, SC Number 1A and SC Number 17, Hazardous Waste Permit Number 50230, Condition X(B)(1)(j), and THSC, §382.085(b), by failing to maintain emissions at or below the permitted rates for the incinerator; PENALTY: $43,500; SEP offset amount of $17,400 applied to City of Orange *Alternative Fuel Vehicle and Equipment Program;* ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: E Z STOP, L.L.C. dba Aman's Food Mart 2; DOCKET NUMBER: 2010-1546-PST-E; IDENTIFIER: RN101799344; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration to the agency for any change or additional information regarding the USTs; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: FIRST TEXAS HOMES, INC.; DOCKET NUMBER: 2010-1668-WQ-El; IDENTIFIER: RN105989586; LOCATION: Rosenberg, Fort Bend County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activity; PENALTY: $750; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: City of Fort Worth; DOCKET NUMBER: 2010-1334-AIR-E; IDENTIFIER: RN100942259; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §111.111(a)(4)(A)(ii) and §122.143(4), FOP Number O-01704, Special Terms and Conditions (STC) Number 1(A), and THSC, §382.085(b), by failing to maintain a daily emissions log for three flares; 30 TAC §122.143(4), FOP Number O-01704, STC Number 8, and THSC, §382.085(b), by failing to maintain records demonstrating compliance with periodic monitoring requirements for the cold solvent cleaners; and 30 TAC §122.143(4) and §122.145(2), FOP Number O-01704, GTC, and THSC, §382.085(b), by failing to report in writing all instances of deviations of FOP Number O-01704;

PENALTY: $15,900; SEP offset amount of $12,720 applied to RC&D - Clean School Buses; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Foty, L.L.C. dba Pick N Pay 2; DOCKET NUMBER: 2010-1305-PST-E; IDENTIFIER: RN100599067; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,537; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: Gardner Production, LLC; DOCKET NUMBER: 2010-1899-WR-E; IDENTIFIER: RN106005879; LOCATION: Jack County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(15) COMPANY: GARRHON ENTERPRISES, INC. dba Shell Food Mart; DOCKET NUMBER: 2010-1325-PST-E; IDENTIFIER: RN102288222; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS) in proper operating condition; 30 TAC §115.242(4) and THSC, §382.085(b), by failing to prevent gasoline leaks detected by sight, sound, or smell anywhere in the Stage II VRS; and 30 TAC §115.245(1) and THSC, §382.085(b), by failing to successfully complete the Stage II VRS testing to ensure that the system meets the performance criteria for the system; PENALTY: $6,655; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Harris County Utility District Number 16; DOCKET NUMBER: 2010-1258-MWD-E; IDENTIFIER: RN102333747; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012614001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permit effluent limits for ammonia nitrogen (NH_3N) and TSS; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0012614001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: H G W ENTERPRISES, INC. dba Super Stop 25; DOCKET NUMBER: 2010-1484-PST-E; IDENTIFIER: RN104499488; LOCATION: Baytown, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II VRS; 30 TAC §115.246(4) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months or upon major system replacement or modification, whichever occurs first; PENALTY: $7,134; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: Inverness Forest Improvement District; DOCKET NUMBER: 2010-1463-MWD-E; IDENTIFIER: RN103786737; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010783001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for NH_3N; PENALTY: $3,440; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: City of Joaquin; DOCKET NUMBER: 2010-1346-MWD-E; IDENTIFIER: RN102095437; LOCATION: Joaquin, Shelby County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012718001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(a), by failing to comply with the permitted effluent limitations for flow, NH_3N, and TSS; PENALTY: $3,280; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(20) COMPANY: Raymond Kent McCutchen dba Kent McCutchen Exxon; DOCKET NUMBER: 2010-1618-PST-E; IDENTIFIER: RN102238656; LOCATION: Greenville, Hunt County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(ii)(I) and the Code, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: $2,003; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2545; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Lamb's Real Estate Investment I, LLC dba Lamb's Tire and Automotive Centers; DOCKET NUMBER: 2010-1485-EAQ-E; IDENTIFIER: RN105793707; LOCATION: Round Rock, Williamson County; TYPE OF FACILITY: automotive center; RULE VIOLATED: 30 TAC §213.4(a)(1) and (j)(1) and Water Pollution Abatement Plan (WPAP) Number 11-09081901, Standard Conditions Numbers 2 and 6, by failing to obtain approval of a modification to an approved WPAP prior to initiating physical and operational modifications to a water quality pond; and 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Protection Program aboveground storage tank facility plan; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Martha Hott, (512) 239-2587; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 787204-5700, (512) 339-2929.

(22) COMPANY: Pine Cove, Inc.; DOCKET NUMBER: 2010-1639-MWD-E; IDENTIFIER: RN105158109; LOCATION: Colorado County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014779001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for TSS; PENALTY: $3,340; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Nazario Sanchez, Jr.; DOCKET NUMBER: 2010-1905-WOC-E; IDENTIFIER: RN106005481; LOCATION: Cotulla, La Salle County; TYPE OF FACILITY: on site installer; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk

Schoppe, (512) 239-0489; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(24) COMPANY: Sebastian Municipal Utility District; DOCKET NUMBER: 2010-1374-PWS-E; IDENTIFIER: RN101193043; LOCATION: Sebastian, Willacy County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.43(c)(8), by failing to maintain all the above ground storage tanks in strict accordance with American Water Works Association standards; and 30 TAC §290.42(e)(4)(A), by failing to provide a full-face self-contained breathing apparatus that meets Occupational Safety and Health Administration standards for construction and operation that is readily accessible outside the chlorination room; PENALTY: $2,895; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(25) COMPANY: Super Serve, Inc.; DOCKET NUMBER: 2010-1444-PST-E; IDENTIFIER: RN101805661; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,117; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: Texmark Chemicals, Inc.; DOCKET NUMBER: 2010-1126-AIR-E; IDENTIFIER: RN100238740; LOCATION: Galena Park, Harris County; TYPE OF FACILITY: chemical processing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), 40 CFR §60.112b(a)(1)(i), FOP Number O-01363, STC Numbers 1A and 13, NSR Permit Number 21472, SC Number 3, and THSC, §382.085(b), by failing to properly operate an internal floating roof tank; and 30 TAC §§106.262(a)(3), 116.110(a)(4), and 122.143(4), FOP Number O-01363, STC Number 13, and THSC, §382.085(b), by failing to provide notice within ten days following the installation or modification of a facility operating under a Permit By Rule; PENALTY: $21,625; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: United Copper Industries, Inc.; DOCKET NUMBER: 2010-1643-AIR-E; IDENTIFIER: RN100683531; LOCATION: Denton, Denton County; TYPE OF FACILITY: copper wire manufacturing plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization for emissions; PENALTY: $7,125; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: Wesco Refractories, Inc.; DOCKET NUMBER: 2010-1429-AIR-E; IDENTIFIER: RN105859565; LOCATION: Mansfield, Tarrant County; TYPE OF FACILITY: refractory products manufacturing plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to construction and operation of a refractory products manufacturing facility; PENALTY: $4,200; ENFORCEMENT COORDINATOR: Gena Hawkins, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201007081

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: December 14, 2010

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Correction of Error

The Texas Commission on Environmental Quality adopted amendments to 30 TAC Chapter 17, concerning Tax Relief for Property Used for Environmental Protection. The adoption notice was published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10964).

The following language was submitted in error by TCEQ staff. Under the "BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES" section of the rule preamble, on page 10964, second column, first paragraph, "This amendment added §1-1 to the Texas Constitution..." should be changed to "This amendment added §1-l to the Texas Constitution..." replacing the number 1 with the letter l.

On page 10965, first column, third paragraph: "The former provision of allowing applicants to choose their own method for calculating a use percentage for these properties resulted in applications for the same types of property with widely varying calculated use percentages" will be replaced with "The former provision, which allowed applicants to choose their own method for calculating a use percentage for these properties, resulted in applications for the same types of property with widely varying calculated user percentages."

On page 10965, second column, first paragraph: "For these partial use items, a Tier III application with the calculation of an actual use percent is required in all cases until the commission determines..." will be replaced with "For these partial use items, a Tier III application with the calculation of an actual use percentage is required in all cases until the commission determines..."

TRD-201007091

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 24, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 24, 2011.** Comments may also be sent by facsimile machine to the attorney at

(512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: City of Godley; DOCKET NUMBER: 2009-0907-MWD-E; TCEQ ID NUMBER: RN101919397; LOCATION: adjacent to West Nolan Creek, approximately 600 feet south of the intersection of State Highway (SH) 171 and Farm-to-Market (FM) Road 917, Godley, Johnson County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1), Texas Health and Safety Code (THSC), §26.121(a), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014887001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to maintain compliance with the permitted effluent limits; 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0014887001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to monitor for each parameter at the frequency specified in the permit; 30 TAC §305.125(1) and TPDES Permit Number WQ0014887001, Monitoring and Reporting Requirements Number 7.c., by failing to submit noncompliance notification reports for effluent violations that deviated from the permitted effluent limits by more than 40%; 30 TAC §305.125(5), TWC, §26.121(a), and TPDES Permit Number WQ0014887001, Permit Conditions Numbers 2.d., by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained, resulting in an unauthorized discharge of partially treated wastewater to water in the state; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number WQ0014887001, Monitoring and Reporting Requirements Number 1, by failing to provide monitoring results at intervals specified in the permit; 30 TAC §305.125(1) and TPDES Permit Number WQ0014887001, Other Requirements Number 4, by failing to submit a summary submittal letter within 60 days of the permit issuance; and TWC, §26.121(a) and 30 TAC §305.65 and §305.125(2), by failing to maintain authorization for the discharge of wastewater; PENALTY: $44,750; Supplemental Environmental Project (SEP) offset amount of $18,000 applied to Texas Association of Resource Conservation & Development Areas, Inc (RC&D) - Household Hazardous Waste Collection, and SEP offset amount of $26,750 applied to Texas Association of RC&D - Water or Wastewater Assistance; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: City of Oakwood; DOCKET NUMBER: 2009-1306-MWD-E; TCEQ ID NUMBER: RN102075553; LOCATION: approximately 1,600 feet south-southwest of the intersection of FM 831 and FM Road 542, southeast of Oakwood, Leon County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(5) and TPDES Permit Number WQ0010586002, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures; PENALTY: $5,375; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Dimitrious Georgopoulos dba Tech Café; DOCKET NUMBER: 2010-0785-PWS-E; TCEQ ID NUMBER: RN101453561; LOCATION: 11710 University Avenue, Lubbock, Lubbock County; TYPE OF FACILITY: café with a public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of May, August, and October 2009 and January and February 2010, and failing to provide public notice of the failure to sample for the months of May, August, and October 2009 and January 2010; PENALTY: $1,994; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7613.

(4) COMPANY: Flo Community Water Supply Corporation; DOCKET NUMBER: 2009-1652-PWS-E; TCEQ ID NUMBER: RN101440949; LOCATION: approximately nine miles southwest of Buffalo, near the intersection of County Road 831 and County Road 1511, Leon County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.45(b)(1)(D)(v) and THSC, §341.0315(c), by failing to provide emergency power that will deliver water at a rate of 0.35 gallons per minute (gpm) per connection in the event of the loss of normal power supply; PENALTY: $1,510; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: George DeVries dba DeVries Dairy; DOCKET NUMBER: 2010-0508-AGR-E; TCEQ ID NUMBER: RN100802917; LOCATION: approximately four miles southwest of Stephenville and 6.5 miles northeast of Dublin, Erath County; TYPE OF FACILITY: concentrated animal feeding operation; RULES VIOLATED: 30 TAC §321.31(a), TWC, §26.121(a)(1), and TCEQ Permit Number 03061, V. Conditions of the Permit, by failing to prevent an unauthorized discharge of wastewater from a confined animal feeding operation into or adjacent to water in the state; PENALTY: $8,300; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Phillip Crump; DOCKET NUMBER: 2009-0741-MSW-E; TCEQ ID NUMBER: RN105625214; LOCATION: end of Private Road 7010 off County Road (CR) 301, near Carthage, Panola County; TYPE OF FACILITY: unauthorized municipal solid waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $900; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: Sofia Enterprises, L.P. dba HTC Industries; DOCKET NUMBER: 2010-1033-AIR-E; TCEQ ID NUMBER: RN102754652; LOCATION: 1812 North Bell Street, San Angelo, Tom Green County; TYPE OF FACILITY: rendering plant; RULES VIOLATED: 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 8710, Special Condition (SC) Numbers 6 and 7 (formerly SC Numbers 5 and 6), by failing to place all raw materials received into the rendering process receiving pit within eight hours after arrival and within 18 hours after slaughter or leaving a refrigerated environment; 30 TAC §116.115(b)(2)(D), THSC, §382.085(b), and Air Permit Number 8710, General Conditions, by failing to obtain authorization prior to the use of an alternative emission control method; 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 8710, SC Numbers 18.B. (1), (3), and (4) (formerly SC Numbers 17.B. (1), (3), (4)), by failing to maintain complete records of the required information for each shipment of raw materials received; 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 8710, SC Number 18.D. (formerly SC Number 17.C.), by failing to maintain complete records of the air temperature of the area entering the air scrubber room at least once per shift but no less than once every ten hours during the operation of the scrubber; and 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 8710, SC Number 18.F. (4) (formerly SC Number 17.E. (4)), by failing to maintain a record of the chemical feed rate to the scrubber system;

PENALTY: $9,302; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(8) COMPANY: Winger Machine & Tool, Inc.; DOCKET NUMBER: 2009-2004-MLM-E; TCEQ ID NUMBER: RN102988698; LOCATION: 3916 South Chadbourne Street, San Angelo, Tom Green County; TYPE OF FACILITY: drill and hammer bit manufacturing and engine and parts refurbishing and repair facility; RULES VIOLATED: 30 TAC §335.9(a)(1), by failing to keep records of all hazardous or industrial solid waste activities regarding the quantities generated, stored, processed, and disposed of on-site or shipped off-site for storage, processing or disposal; 30 TAC §§335.503(a), 335.513(a), 335.62, and 40 Code of Federal Regulations, §262.11, by failing to conduct hazardous waste determinations for all wastes generated at the facility; 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain proper permit authorization prior to the construction and operation of a heat cleaning device; PENALTY: $13,490; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

TRD-201007096
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 14, 2010

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 24, 2011.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 24, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Atlas Pallet Industries, Inc.; DOCKET NUMBER: 2010-0759-AIR-E; TCEQ ID NUMBER: RN100776509; LOCATION: 3532 South Interstate 35 West, Alvarado, Johnson County; TYPE OF FACILITY: pallet manufacturing business; RULES VIOLATED: 30 TAC §122.146(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit a Permit Compliance Certification; and 30 TAC §205.6 and TWC, §5.702, by failing to pay outstanding General Permits Stormwater fees and associated late fees for TCEQ Financial Account Number 20036462; PENALTY: $1,130; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Eugene O. Boeck and Irma Boeck; DOCKET NUMBER: 2010-1177-PST-E; TCEQ ID NUMBER: RN101725570; LOCATION: 10205 East Highway 90, Kingsbury, Guadalupe County; TYPE OF FACILITY: four underground storage tanks; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a underground storage tank system (UST) for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.54(b)(2), by failing to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; and 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs within 30 days from the date of the occurrence of the change or addition; PENALTY: $3,745; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: Joey Sisca; DOCKET NUMBER: 2009-1566-LII-E; TCEQ ID NUMBER: RN104574389; LOCATION: Travis County; TYPE OF FACILITY: sells, designs, offers consultations regarding, installs, maintains, alters, repairs, and/or services landscape irrigation systems; RULES VIOLATED: 30 TAC §30.5(b) and §334.50(a)(2) and TCEQ Agreed Order (AO) Docket Number 2005-1114-LII-E, Ordering Provision Number 2.b., by failing to possess an irrigator license before advertising or representing to the public that an individual can perform services for which a license is required unless the individual holds a license or employs an individual who holds a current license; and TWC, §7.061 and TCEQ AO Docket Number 2005-1114-LII-E, Ordering Provision Number 1, by failing to pay the outstanding administrative penalty for Account Number 23602445; PENALTY: $900; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Soda Water Supply Corporation; DOCKET NUMBER: 2010-1010-PWS-E; TCEQ ID NUMBER: RN101221315; LOCATION: United States (U.S.) Highway 190 West, 0.5 miles from the U.S. Highway 59 Intersection, Polk County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to provide sanitary control easements covering land within 150 feet of each well or obtain executive director approval for a substitute; 30 TAC §290.121(a), by failing to provide an adequate

up-to-date chemical and microbiological monitoring plan; and 30 TAC §290.39(j)(1)(A) and THSC, §341.035, by failing to notify the commission prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production; PENALTY: $312; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Tony Hutcheson dba Elm Grove Mobile Home Park; DOCKET NUMBER: 2010-0791-PWS-E; TCEQ ID NUMBER: RN101438380; LOCATION: 2201 Research Boulevard, Lubbock, Lubbock County; TYPE OF FACILITY: mobile home park with a public water system; RULES VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1 of each year and failing to submit to the TCEQ by July of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay public health service fees, including late fees, for TCEQ Financial Administration Account Number 91520156 for Fiscal Years 2009 and 2010; PENALTY: $466; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7613.

TRD-201007095
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 14, 2010

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Notice of Water Quality Applications

The following notice was issued on December 3, 2010 through December 10, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

AZTECA MILLING LP which operates the Azteca Dawn Texas Plant, has applied for a renewal of TCEQ Permit No. WQ0004052000, which is authorized to dispose of process wastewater and wash water generated from the process of cooking and washing corn at a daily average flow not to exceed 320,000 gallons per day. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located on the west side of Farm-to-Market Road 809, approximately 500 feet north of the intersection of Farm-to-Market Road 809 and Farm-to-Market Road 1062, Deaf Smith County, Texas 79025.

PLAINS COTTON COOPERATIVE ASSOCIATION which operates the American Cotton Growers Plant, has applied to the for a new permit, proposed TCEQ Permit No. WQ0004926000, to authorize the disposal of brine from water softener regeneration, indigo dye rinse water, and preparation range rinse water at a daily average flow not exceed 205,000 gallons per day via evaporation; and starch wastewater at a daily average flow rate not to exceed 4,000 gallons per day via soil injection. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located adjacent to State Highway 54 at 1926 Farm-to-Market Road 54, approximately 1.4 miles east of the City of Littlefield, Lamb County, Texas 79339.

KIMBERLY CLARK CORPORATION which operates the Kimberly-Clark Paris Plant, has applied for a renewal of TPDES Permit No. WQ0002648000, which authorizes the discharge of treated process wastewater, boiler blowdown, cooling tower blowdown, and noncontact cooling water at a daily average flow not to exceed 300,000 gallons per day via Outfall 001 and storm water on an intermittent and flow variable basis via Outfall 002 and Outfall 003. The facility is located at 2466 Farm-to-Market Road 137, southwest of the intersection of State Highway Loop 286 and Farm-to-Market Road 137 in the City of Paris, Lamar County, Texas 75460.

CITY OF PORT LAVACA has applied for a renewal of TPDES Permit No. WQ0010251001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located at the southeast corner of the intersection of Newlin Street and Commerce Street in the City of Port Lavaca, approximately 1.4 miles northeast from the intersection of State Highway 35 and U.S. Highway 87 in Calhoun County, Texas 77979.

BROWNSVILLE PUBLIC UTILITIES BOARD has applied for a major amendment to TPDES Permit No. WQ0010397003 to authorize the removal of effluent limitations and monitoring requirements for Mercury. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 12,800,000 gallons per day. The current permit also authorizes the disposal of sewage sludge at Brownsville Public Utilities Board Sludge Only Dedicated Land Disposal (DLD) site in Cameron County. The facility is located at 2800 East Avenue, north of the 2800 block of East Avenue, approximately 1/2 mile west of 30th Street in southeast Brownsville in Cameron County, Texas 78521. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF PARIS has applied for a renewal of TPDES Permit No. WQ0010479002 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 7,250,000 gallons per day. The facility is located approximately 0.5 mile east of U.S. Highway 271 and 1.7 miles northeast of the intersection of Farm-to-Market Road 1499 and U.S. Highway 271, six miles north of the City of Paris in Lamar County, Texas 75460.

CITY OF DODD CITY has applied for a renewal of TPDES Permit No. WQ0010538001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 48,000 gallons per day. The facility is located 2,200 feet southwest of the intersection of State Highway 897 and U.S. Highway 82, and approximately 2,500 feet southeast of the intersection of U.S. Highway 82 and Farm-to-Market Road 2077, southeast of Dodd City in Fannin County, Texas 75348.

CITY OF LONGVIEW has applied for a renewal of TPDES Permit No. WQ0010589004, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 1,008,000 gallons per day. The facility is located approximately one mile west of the intersection of Judson Road and Farm-to-Market Road 1844 in Gregg County, Texas 75606.

THE CITY OF SOUR LAKE has applied for a renewal of TPDES Permit No. WQ0010703001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gal-

lons per day. The facility is located approximately 1/2 mile southwest of the City of Sour Lake, approximately 3/4 mile west of State Highway 326 in Hardin County, Texas 77659.

CITY OF POINT has applied for a renewal of TPDES Permit No. WQ0010964001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located at 127 Locust Street, approximately 2,100 feet east of the intersection of Farm-to-Market Road 47 and U.S. Highway 69 in the City of Point in Rains County, Texas 75472.

CITY OF POINT TEXAS has applied for a renewal of TPDES Permit No. WQ0010964002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located on Industrial Boulevard approximately 1,500 feet west of the intersection of Farm-to-Market Road 514 and U.S. Highway 69 in Rains County, Texas 75472.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0011738001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located within Tyler State Park on Park Road 16, approximately 0.3 mile west of Farm-to-Market Road 14, approximately 0.75 mile south-southwest of the intersection of Farm-to-Market Road 14 with Park Road 16, approximately 1.3 miles north of Interstate Highway 20, and approximately 7 miles north of Tyler in Smith County, Texas 75706.

BAYOU FOREST VILLAGE INC has applied for a renewal of TPDES Permit No. WQ0012259001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located approximately 2,500 feet southeast of the intersection of Aldine Mail Road and Aldine-Westfield Road at 12500 Aldine-Westfield Road in Harris County, Texas 77039.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 285 has applied for a renewal of TPDES Permit No. WQ0012928001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located approximately 500 feet north of the intersection of Wickhamford Way and Crosshaven Drive, approximately 3/4 mile west of Carpenters Bayou in Harris County, Texas 77015.

TAWAKONI WASTE LLC has applied for a renewal of TPDES Permit No. WQ0014297001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located at 10636 Black Bass Road, Quinlan, Texas 75474, approximately 1,000 feet southwest of the intersection of Farm-to-Market Road 429 and Farm-to-Market Road 751, on the northwest side of Farm-to-Market Road 429, between Farm-to-Market Road 429 and Lake Tawakoni in Hunt County, Texas 75474.

HARRIS FORT BEND COUNTIES MUNICIPAL UTILITY DISTRICT NO 3 has applied for a renewal of TPDES Permit No. WQ0014301001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located approximately 2,000 feet south of Interstate Highway 10 and 3,300 feet east of Katy-Ft. Bend Road; approximately 4,000 feet southeast of the intersection of Interstate Highway 10 and Katy-Ft. Bend Road in Harris County, Texas 77494.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201007120

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 15, 2010

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Public Notice - Shutdown/Default Orders

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 24, 2011.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 24, 2011.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Afzal Shekhani dba Ella Food Mart; DOCKET NUMBER: 2010-0911-PST-E; TCEQ ID NUMBER: RN105185946; LOCATION: 903 West Road, Houston, Harris County; TYPE OF FACILITY: two underground storage tanks (USTs) and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as

motor fuel; 30 TAC §334.50(b)(1)(A), (d)(1)(B)(ii) and (iii)(I), and TWC, §26.3475(c)(1), by failing to monitor the UST for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring), failing to conduct reconciliation of detailed inventory control records at least once each month, in a manner sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons, and failing to record inventory volume measurement for the regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form; 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip the tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid reaches a preset level no higher than 95% capacity level for the tank; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid-tight, and free from liquid or debris; and 30 TAC §115.246(6) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review upon request by agency personnel; PENALTY: 25,980; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Bluff Springs Enterprises, Inc. dba Texan Food Mart; DOCKET NUMBER: 2010-0616-PST-E; TCEQ ID NUMBER: RN10235111; LOCATION: 7612 Bluff Springs Road, Austin, Travis County; TYPE OF FACILITY: USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding USTs within 30 days from the date of occurrence of the change or addition; 30 TAC §334.49(a), (c)(2)(C) and (4)(C), and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system, failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly, and failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(b)(1)(A), (b)(2) and (2)(A)(i)(III), (d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST system for releases at a frequency of at least once every month (not to exceed 35 days between monitoring), failing to provide release detection for the piping associated with the UST system, failing to test the line leak detectors at least once per year for performance and operational reliability, failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons, and failing to record the inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; and 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches no higher than 95% capacity; PENALTY: $12,896; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-201007094
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 14, 2010

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Texas Facilities Commission

Request for Proposals #303-1-20266

The Texas Facilities Commission (TFC), on behalf of the Texas Health and Human Services Commission, and the Department of Aging and Disability Services, announces the issuance of Request for Proposals (RFP) #303-1-20266. TFC seeks a five or ten year lease of approximately 14,783 square feet of office space in City of Garland, Dallas County, Texas.

The deadline for questions is January 12, 2011, and the deadline for proposals is January 19, 2011, at 3:00 p.m. The target award date is March 19, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. Any addendum to the original RFP will be posted to the Electronic State Business Daily. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=92268.*

TRD-201006997
Kay Molina
General Counsel
Texas Facilities Commission
Filed: December 9, 2010

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General Land Office

Notice of Violation - Derelict Vessels

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 17 August 2010.

PRELIMINARY REPORT

Based upon an inspection conducted by OSPR Region 5 staff on 17 August 2010, the Deputy Commissioner of the General Land Office (GLO), Oil Spill Prevention and Response Division has determined that the remains of seven (7) steel-hulled barges, USCG Vessel Documentation No. Unknown, are in an abandoned, wrecked, and derelict condition without the consent of the commissioner. The seven steel-hulled vessels are identified by GLO tracking # as 5-948, 5-949, 5-950, 9-951, 5-952, 5-953 and 5-954. The vessels are located in Culver Cut, adjacent to the Mad Island Wildlife Management Area, north of the Gulf Intracoastal Waterway (GIWW) in Matagorda County, Texas. The vessels specifically located at the following locations:

Vessel #5-948 - Latitude 28 degrees 40 minutes 13 seconds N, Longitude 96 degrees 0 minutes 43 seconds W

Vessel #5-949 - Latitude 28 degrees 12 minutes 13 seconds N, Longitude 96 degrees 0 minutes 43 seconds W

Vessel #5-950 - Latitude 28 degrees 09 minutes 13 seconds N, Longitude 96 degrees 0 minutes 44 seconds W

Vessel #5-951 - Latitude 28 degrees 40 minutes 05 seconds N, Longitude 96 degrees 0 minutes 43 seconds W

Vessel #5-952 - Latitude 28 degrees 40 minutes 03 seconds N, Longitude 96 degrees 0 minutes 42 seconds W

Vessel #5-953 - Latitude 28 degrees 40 minutes 02 seconds N, Longitude 96 degrees 0 minutes 41 seconds W

Vessel #5-954 - Latitude 28 degrees 40 minutes 01 seconds N, Longitude 96 degrees 0 minutes 41 seconds W

The GLO is unable to determine the owner or responsible person(s) for this vessel. The Commissioner has further determined that, because of the vessel's condition and location, the vessel poses a navigational hazard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

Violation

You are hereby given notice, pursuant to the provisions of §40.254 of the Texas Natural Resources Code (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or threatened unauthorized discharge of oil, a threat to the public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

Recommendation

The Commissioner recommends that these seven vessels be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of any of these seven vessels can request a hearing to contest the violation and the removal and disposal of any of the vessels. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201007114
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: December 15, 2010

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Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by David A. Pyle, Licensed State Land Surveyor, conducted November 9, 2010, locating the following shoreline boundary:

Coastal Boundary Survey on the shore of the Village of Surfside Beach, extending from Starfish Street southwestward to the Freeport Harbor Channel and being the littoral boundary along the line of Mean Higher High Water of the Gulf of Mexico, same being a portion of the southerly boundary line of the Frederick J. Calvit Survey, Abstract 51 and same being the northerly boundary line of Gulf of Mexico Submerged Land Tract No. 356, Brazoria, County.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5223, email Bill.O'Hara@glo.state.tx.us, or fax (512) 463-5098.

TRD-201007093
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: December 14, 2010

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Office of the Governor

Correction of Error

The Office of the Governor, Criminal Justice Division, published a notice titled "Request for Grant Applications for the Juvenile Accountability Block Grant Discretionary Program" in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10777), TRD-201006620.

There was an error of omission in the section titled "Eligibility Requirements" located on page 10778 between the "Eligible Applicants" and "Requirements" sections.

The original text read as follows:

Eligible Applicants:

(1) State agencies;

(2) Units of local government including crime control and prevention districts; and

(3) Native American Tribal Governments.

Requirements:

As corrected, the text should read as follows:

Eligible Applicants:

(1) State agencies;

(2) Units of local government including crime control and prevention districts; and

(3) Native American Tribal Governments.

Eligibility Requirements:

(1) Eligible applicants must have a DUNS (Data Universal Numbering System) number assigned to its agency, to request a DUNS number, go to http://fedgov.dnb.com/webform/displayHomePage.do; and

(2) Eligible applicants must be registered in the federal Central Contractor Registration (CCR) database located at http://www.ccr.gov and maintain an active registration throughout the grant period.

Requirements:

TRD-201007126

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Correction of Error

The Office of the Governor, Criminal Justice Division, published a notice titled "Request for Grant Applications for the Criminal Justice Programs Solicitation" in the December 17, 2010, issue of the *Texas Register* (35 TexReg 11426), TRD-201006964.

The first item under the "Eligibility Requirements" section was included in error.

The original text read as follows:

Eligibility Requirements:

(1) Eligible applicants are limited to one application;

(2) Projects must focus on reducing crime and improving the criminal justice system;

(3) Eligible applicants must provide law enforcement, corrections, or judicial services;

(4) Eligible applicants operating a law enforcement agency must be current on reporting Part I violent crime data to the Texas Department of Public Safety for inclusion in the annual Uniform Crime Report (UCR) and must have been current for the three previous years;

(5) Eligible applicants must have a DUNS (Data Universal Numbering System) number assigned to its agency, to request a DUNS number, go to http://fedgov.dnb.com/webform/displayHomePage.do; and

(6) Eligible applicants must be registered in the federal Central Contractor Registration (CCR) database located at http://www.ccr.gov and maintain an active registration throughout the grant period.

As corrected, the text should read as follows:

(1) Projects must focus on reducing crime and improving the criminal justice system;

(2) Eligible applicants must provide law enforcement, corrections, or judicial services;

(3) Eligible applicants operating a law enforcement agency must be current on reporting Part I violent crime data to the Texas Department of Public Safety for inclusion in the annual Uniform Crime Report (UCR) and must have been current for the three previous years;

(4) Eligible applicants must have a DUNS (Data Universal Numbering System) number assigned to its agency, to request a DUNS number, go to http://fedgov.dnb.com/webform/displayHomePage.do; and

(5) Eligible applicants must be registered in the federal Central Contractor Registration (CCR) database located at http://www.ccr.gov and maintain an active registration throughout the grant period.

TRD-201007127

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Texas Health and Human Services Commission

Notice of Proposed Reimbursement Rates for Non-state Operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR)

Proposed Rates. As the single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) proposes the following per diem reimbursement rates for the non-state operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program operated by the Texas Department of Aging and Disability Services (DADS). The Notice of Public Hearing for these proposed rates is being published in the same issue of the *Texas Register* as this notice.

Reimbursement rates for the non-state operated ICF/MR program are proposed to be effective February 1, 2011, as follows:

Per Diem Rates for Non-state Operated ICF/MR Services by Level of Need and Facility Size.

Level of Need	8 or Less Beds	9-13 Beds	14+ Beds
1 Intermittent	144.39	118.13	112.17
5 Limited	160.87	134.14	119.72
8 Extensive	182.97	159.04	133.32
6 Pervasive	224.05	190.39	179.56
9 Pervasive +	406.44	386.16	387.57

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at Texas Administrative Code (TAC) Title 1, Chapter 355, Subchapter A, §355.112, Attendant Compensation Rate Enhancement, and Subchapter D, §355.456, Rate Setting Methodology. These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101, Introduction, §355.109, Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs and 1 TAC Chapter 355, Subchapter B, §355.201, Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission. These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011.

TRD-201007088
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Proposed Reimbursement Rates for Nursing Facilities

Proposed Rates. As the single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC)

proposes the following per diem reimbursement rates for the Nursing Facility program operated by the Texas Department of Aging and Disability Services (DADS). The Notice of Public Hearing for these proposed rates is being published in the same issue of the *Texas Register* as this notice.

Reimbursement rates for the Nursing Facility program are proposed to be effective February 1, 2011, as follows:

Base Rates by RUG (Resource Utilization Group) class:

RUG	RUG Base Rate
RAD (Rehabilitation D)	$182.42
RAC (Rehabilitation C)	$161.13
RAB (Rehabilitation B)	$151.33
RAA (Rehabilitation A)	$133.09
SE3 (Extensive Services 3)	$217.86
SE2 (Extensive Services 2)	$184.98
SE1 (Extensive Services 1)	$160.62
SSC (Special Care C)	$156.86
SSB (Special Care B)	$148.29
SSA (Special Care A)	$147.96
CC2 (Clinically Complex C2)	$128.13
CC1 (Clinically Complex C1)	$121.37
CB2 (Clinically Complex B2)	$117.54
CB1 (Clinically Complex B1)	$112.23
CA2 (Clinically Complex A2)	$106.55
CA1 (Clinically Complex A1)	$100.16
IB2 (Impaired Cognition B2)	$106.71
IB1 (Impaired Cognition B1)	$99.49
IA2 (Impaired Cognition A2)	$90.86
IA1 (Impaired Cognition A1)	$86.16
BB2 (Behavior Problems B2)	$104.78
BB1 (Behavior Problems B1)	$94.83
BA2 (Behavior Problems A2)	$89.15
BA1 (Behavior Problems A1)	$80.67
PE2 (Reduced Physical Function E2)	$112.84
PE1 (Reduced Physical Function E1)	$106.67
PD2 (Reduced Physical Function D2)	$108.17
PD1 (Reduced Physical Function D1)	$101.79
PC2 (Reduced Physical Function C2)	$99.09
PC1 (Reduced Physical Function C1)	$95.02
PB2 (Reduced Physical Function B2)	$92.51
PB1 (Reduced Physical Function B1)	$88.03
PA2 (Reduced Physical Function A2)	$82.55
PA1 (Reduced Physical Function A1)	$77.89
Default when Minimum Date Set assessment data are incomplete	$77.89
Default when a Minimum Data Set assessment is missing.	$77.89
Supplemental Payments:	
Ventilator - Continuous	$121.34
Ventilator - Less than Continuous	$48.54
Pediatric Tracheostomy	$72.80

Facilities participating in the Enhanced Direct Care Staff Rate will receive one of the following payment rates per day in addition to the above payment rates based upon their level of enrollment in the Enhanced Direct Care Staff Rate:

Minutes Associated with Proposed Rate*	Proposed Rate Per Diem
1 LVN Minute = 2.05 Aide Minutes = 0.68 RN Minutes	$0.38
2 LVN Minutes = 4.11 Aide Minutes = 1.37 RN Minutes	$0.76
3 LVN Minutes = 6.16 Aide Minutes = 2.05 RN Minutes	$1.14
4 LVN Minutes = 8.21 Aide Minutes = 2.74 RN Minutes	$1.52
5 LVN Minutes = 10.26 Aide Minutes = 3.42 RN Minutes	$1.90
6 LVN Minutes = 12.32 Aide Minutes = 4.11 RN Minutes	$2.28
7 LVN Minutes = 14.37 Aide Minutes = 4.79 RN Minutes	$2.66
8 LVN Minutes = 16.42 Aide Minutes = 5.47 RN Minutes	$3.04
9 LVN Minutes = 18.47 Aide Minutes = 6.16 RN Minutes	$3.42
10 LVN Minutes = 20.53 Aide Minutes = 6.84 RN Minutes	$3.80
11 LVN Minutes = 22.58 Aide Minutes = 7.53 RN Minutes	$4.18
12 LVN Minutes = 24.63 Aide Minutes = 8.21 RN Minutes	$4.56
13 LVN Minutes = 26.68 Aide Minutes = 8.89 RN Minutes	$4.94
14 LVN Minutes = 28.74 Aide Minutes = 9.58 RN Minutes	$5.32
15 LVN Minutes = 30.79 Aide Minutes = 10.26 RN Minutes	$5.70
16 LVN Minutes = 32.84 Aide Minutes = 10.95 RN Minutes	$6.08
17 LVN Minutes = 34.89 Aide Minutes = 11.63 RN Minutes	$6.46
18 LVN Minutes = 36.95 Aide Minutes = 12.32 RN Minutes	$6.84
19 LVN Minutes = 39.00 Aide Minutes = 13.00 RN Minutes	$7.22
20 LVN Minutes = 41.05 Aide Minutes = 13.68 RN Minutes	$7.60
21 LVN Minutes = 43.10 Aide Minutes = 14.37 RN Minutes	$7.98
22 LVN Minutes = 45.16 Aide Minutes = 15.05 RN Minutes	$8.36
23 LVN Minutes = 47.21 Aide Minutes = 15.74 RN Minutes	$8.74
24 LVN Minutes = 49.26 Aide Minutes = 16.42 RN Minutes	$9.12
25 LVN Minutes = 51.32 Aide Minutes = 17.11 RN Minutes	$9.50
26 LVN Minutes = 53.37 Aide Minutes = 17.79 RN Minutes	$9.88
27 LVN Minutes = 55.42 Aide Minutes = 18.47 RN Minutes	$10.26

* LVN = Licensed Vocational Nurse; RN = Registered Nurse

Facilities that verify liability insurance coverage acceptable to HHSC will receive one of the following payment rates per day in addition to the above payment rates based upon the type of liability insurance coverage they maintain:

Type of Liability Insurance	Proposed Rate Per Diem
General and Professional	$1.58
Professional Only	$1.45
General Only	$0.13

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodology at Texas Administrative Code (TAC) Title 1, Chapter 355, Subchapter A, §355.307, Reimbursement Setting Methodology; §355.308, Direct Care Staff Rate Component; and §355.312, Reimbursement Setting Methodology - Liability Insurance Costs. These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101, Introduction, and §355.109, Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs and 1 TAC Chapter 355, Subchapter B, §355.201, Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission. These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011.

TRD-201007086

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing

Medicaid Managed Care Stakeholder Forum of the Expansion of STAR+PLUS (Dallas Service Area)

January 13, 2011

1:00 p.m. to 3:00 p.m.

Meeting Site:

Texas Health Resources Corporate Office

Executive Conference Hall, 7th Floor

612 E. Lamar Blvd, Arlington

Overview

The STAR+PLUS Medicaid program will be expanding into the Dallas and Tarrant service areas (SAs) effective February 1, 2011. HHSC will update stakeholders in these SAs on the current status of the STAR+PLUS expansion and answer questions about the program.

Contact: Diane Eberhart, Program Specialist-Managed Care Operations, (512) 491-1126, HHSC, 11209 Metric Blvd., Austin, diane.eberhart@hhsc.state.tx.us.

Special Instructions: The Executive Conference Hall is located on the 7th floor in the Tower Building on the corporate campus of Texas Health Resources. Parking is free on the campus.

This meeting is open to the public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Diane Eberhart at (512) 491-1126 at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201007099
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing

Medicaid Managed Care Stakeholder Forum of the Expansion of STAR+PLUS (Tarrant Service Area)

January 13, 2011

9:00 a.m. to 11:00 a.m.

Meeting Site:

Texas Health Resources Corporate Office

Executive Conference Hall, 7th Floor

612 East Lamar Boulevard, Arlington

Overview

The STAR+PLUS Medicaid program will be expanding into the Tarrant and Dallas service areas (SAs) effective February 1, 2011. HHSC will update stakeholders in these SAs on the current status of the STAR+PLUS expansion and answer questions about the program.

Contact: Diane Eberhart, Program Specialist-Managed Care Operations, (512) 491-1126, HHSC, 11209 Metric Boulevard, Austin, diane.eberhart@hhsc.state.tx.us.

Special Instructions: The Executive Conference Hall is located on the 7th floor in the Tower Building on the corporate campus of Texas Health Resources. Parking is free on the campus.

This meeting is open to the public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Diane Eberhart at (512) 491-1126 at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201007092
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on January 7, 2011, at 10:00 a.m. to receive public comment on payment rate reductions for the Nursing Facility (NF) program and the Out-of-Home Respite in a NF and Consumer Directed Services Out-of-Home Respite in a NF services in the Community Based Alternatives (CBA) and Integrated Care Management (ICM) Home and Community Support Services and Assisted Living/Residential Care waiver programs, the Out-of-Home Respite in a NF and Consumer Directed Services Out-of-Home Respite in a NF services in the Consolidated Waiver Program (CWP), and the Out-of-Home Respite service in the Medically Dependent Children Program (MDCP). These programs are operated by the Texas Department of Aging and Disability Services (DADS). The hearing will be held in compliance with Human Resources Code §32.0282, which requires a public hearing on proposed payment rates. The public hearing will be held in the Brown-Heatly Building Public Hearing Room, 4900 North Lamar Boulevard, Austin, Texas. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Jamie Mollenhauer by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. On December 6, 2010, the Governor, Lieutenant Governor and House Speaker sent a letter to all State Agencies asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011. The following rate reductions are proposed in response to this letter. These reductions are all proposed to be effective February 1, 2011.

Reimbursement rates for NFs are proposed to be reduced by an additional two percent below the rates that were in effect August 31, 2010. This proposed reduction is in addition to the one percent reduction to the August 31, 2010, rates that became effective September 1, 2010. The combined impact of these two reductions will be that NF rates proposed to be effective February 1, 2011, will be three percent less than NF rates in effect on August 31, 2010.

Reimbursement rates for the Out-of-Home Respite in a NF and Consumer Directed Services Out-of-Home Respite in a NF services in CBA, ICM and CWP, and Out-of-Home Respite services in MDCP are tied by Texas Administrative Code rule to reimbursement rates for

NFs. These rates are proposed to be reduced by three percent below the rates that were in effect August 31, 2010.

All proposed rates were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification."

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at Title 1 of the Texas Administrative Code (TAC), Chapter 355, Subchapter C, §355.307, Reimbursement Setting Methodology, §355.308, Direct Care Staff Rate Component, and §355.312, Reimbursement Setting Methodology Liability Insurance Costs, Subchapter E, §355.503, Reimbursement Methodology for the Community-Based Alternatives Waiver Program and the Integrated Care Management-Home and Community Support Services and Assisted Living/Residential Care Programs, §355.506, Reimbursement Methodology for Consolidated Waiver Program, and §355.507, Reimbursement Methodology for the Medically Dependent Children Program. These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101, Introduction, and §355.109, Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs, and Subchapter B, §355.201, Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission. These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011.

Briefing Package. A briefing package describing the proposed payment rates will be available at: http://www.hhsc.state.tx.us/Medicaid/programs/rad/RatePackets.html on December 20, 2010. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Jamie Mollenhauer by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at jamie.mollenhauer@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Jamie Mollenhauer, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Jamie Mollenhauer at (512) 491-1998; or by e-mail to jamie.mollenhauer@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Jamie Mollenhauer, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-201007087
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on January 7, 2011, at 11:00 a.m. to receive public comment on payment rate reductions for the non-state operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program and the Home and Community-based Services (HCS) and Texas Home Living (TxHmL) waiver programs and the Out-of-Home Respite in an ICF/MR, Consumer Directed Services Out-of-Home Respite in an ICF/MR and 24-Hour Residential Habilitation services in the Consolidated Waiver Program (CWP) and the Supported Employment and Employment Assistance services in the Deaf-Blind with Multiple Disabilities (DBMD) waiver program. These programs are operated by the Texas Department of Aging and Disability Services (DADS). The hearing will be held in compliance with Human Resources Code §32.0282, which requires a public hearing on proposed payment rates. The public hearing will be held in the Brown-Heatly Building Public Hearing Room, 4900 North Lamar Boulevard, Austin, Texas. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Esther Brown by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. On December 6, 2010, the Governor, Lieutenant Governor and House Speaker sent a letter to all State Agencies asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011. The following rate reductions are proposed in response to this letter. These reductions are all proposed to be effective February 1, 2011.

Reimbursement rates for non-state operated ICFs/MR are proposed to be reduced by an additional two percent below the rates that were in effect August 31, 2010. This proposed reduction is in addition to the one percent reduction to the August 31, 2010, rates that became effective September 1, 2010. The combined impact of these two reductions will be that non-state operated ICF/MR rates proposed to be effective February 1, 2011, will be three percent less than non-state operated ICF/MR rates in effect on August 31, 2010. Reimbursement rates for ICF/MR Attendant Compensation Rate Enhancement add-ons are not proposed to be reduced.

Reimbursement rates for the Out-of-Home Respite in an ICF/MR and Consumer Directed Services Out-of-Home Respite in an ICF/MR services in CWP are tied by Texas Administrative Code rule to reimbursement rates for ICF/MR. These rates are proposed to be reduced by three percent below the rates that were in effect August 31, 2010.

Reimbursement rates for all HCS and TxHmL services except Registered Nurse (RN), Specialized RN, Licensed Vocational Nurse (LVN), Specialized LVN, Behavioral Support, Physical Therapy, Occupational Therapy, Speech Therapy, Audiology, and Dietary are proposed to be reduced by two percent below the rates that were in effect August 31, 2010. Reimbursement rates for HCS and TxHmL Attendant Compensation Rate Enhancement add-ons are not proposed to be reduced.

Reimbursement rates for the 24-Hour Residential Habilitation service in CPW and the Supported Employment and Employment Assistance services in DBMD are tied by rule to reimbursement rates in HCS. These rates are proposed to be reduced by two percent below the rates that were in effect August 31, 2010.

All proposed rates were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification."

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at Title 1 of the Texas Administrative Code (TAC), Chapter 355, Subchapter D, §355.456, Rate Setting Methodology, Subchapter E, §355.506, Reimbursement Methodology for Consolidated Waiver Program, and §355.513, Reimbursement Methodology for the Deaf-Blind with Multiple Disabilities Waiver Program, and Subchapter F, §355.723, Reimbursement Methodology for Home and Community-Based Services (HCS), and §355.791, Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) Program. These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101, Introduction, and §355.109, Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs, and Subchapter B, §355.201, Establishment

and Adjustment of Reimbursement Rates by the Health and Human Services Commission. These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011.

Briefing Package. A briefing package describing the proposed payment rates will be available at: http://www.hhsc.state.tx.us/Medicaid/programs/rad/RatePackets.html on December 20, 2010. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Esther Brown by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Esther Brown, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Esther Brown at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Esther Brown, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-201007089
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing on Proposed Medicaid Payment Reductions

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on January 7, 2011, at 8:00 a.m. to receive comments on proposed Medicaid payment reductions for Clinical Laboratory Services (non-state entities), Freestanding Psychiatric Facilities (non-state entities), Renal Dialysis Facilities, Ambulatory Surgical Centers/Hospital Based Ambulatory Surgical Centers (ASC/HASC), Hospital Outpatient Medicaid Services and Inpatient Hospital Services. The public hearing will be held in the Public Hearing Room of HHSC, Brown-Heatly Building, located at 4900 N. Lamar Boulevard, Austin, Texas. The hearing will be held in compliance with Human Resources Code §32.0282 and the Texas Administrative Code, Title 1 (1 TAC), §355.105(g), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. On December 6, 2010, the Governor, Lieutenant Governor, and House Speaker sent a letter to all State Agencies asking them to identify savings for 2.5 percent of their original general revenue and general-dedicated-appropriations for fiscal year 2011. In response to this direction, and in accordance with Title 1 of the Texas Administrative Code 355.201(d), HHSC proposes to adjust payments for Clinical Laboratory Services (non-state entities), Freestanding Psychiatric Facilities (non-state entities), Renal Dialysis Facilities, ASC/HASC, Hospital Outpatient Medicaid Services and Inpatient Hospital Services. The payments are proposed to be reduced by an additional one percent below the rates that were in effect August 31, 2010, for Clinical Laboratory Services (non-state entities), Freestanding Psychiatric Facilities (non-state entities), Renal Dialysis Facilities, ASC/HASC, Hospital Outpatient Medicaid Services. This proposed reduction is in addition to the one percent reduction to the August 31, 2010, rates that became effective September 1, 2010, for a combined impact that will be a two percent reduction effective February 1, 2011. For Hospital Inpatient Services, the payments are proposed to be reduced by an additional one percent below the rates that were in effect November 1, 2010, for a combined impact that will be a two percent reduction effective February 1, 2011.

Methodology and Justification. The payment rates were calculated in accordance with 1 TAC §355.8610, which addresses the reimbursement methodology for Clinical Laboratory Services; 1 TAC §355.8063, which addresses the reimbursement methodology for Freestanding Psychiatric Facilities; 1 TAC §355.8121, which addresses the reimbursement methodology for ASC/HASC; 1 TAC §355.8061, which addresses the reimbursement methodology for Hospital Outpatient Services; 1 TAC §355.8660, which addresses the reimbursement methodology for Renal Dialysis Facilities; and 1 TAC §355.8052, Texas Medicaid Reimbursement Methodology (TMRM) for Inpatient Hospital Services. The rates were subsequently adjusted in accordance with 1 TAC §355.101, Introduction; 1 TAC §355.109, Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs; and 1 TAC §355.201, Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission. These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011.

Briefing Package. A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/Medicaid/programs/rad/RatePackets.html on or after December 20, 2010. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201007108
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Notice of Public Hearing on Proposed Medicaid Payment Reductions

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on January 7, 2011, at 1:00 p.m., to receive comment on proposed Medicaid payments for Ambulance Services; Case Management for Pregnant Women; Early and Periodic Screening, Diagnosis and Treatment Services, including Medical

Checkups, Private Duty Nursing, and Therapies in a Comprehensive Outpatient Rehabilitation Facility/Outpatient Rehabilitation Facility (but not including Personal Care Services); Family Planning Services; Home Health Services, including Professional Services and Durable Medical Equipment and Expendable Supplies; Mental Health Rehabilitation Services; Mental Health Targeted Case Management; Physicians and Certain Other Practitioners, including Dental Services, Anesthesia Services, Licensed Clinical Social Workers, Licensed Professional Counselors, Licensed Marriage and Family Therapists, and other practitioners; Tuberculosis Clinics; and the Vendor Drug Dispensing Fee, to include both the fixed and variable component of the fee. The public hearing will be held in the Public Hearing Room, Brown-Heatly Building, 4900 N. Lamar, Austin, Texas. The hearing will be held in compliance with Human Resources Code §32.0282, Texas Administrative Code, Title 1 (1 TAC), §355.105, and §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The Medicaid payments for the following services are proposed to be reduced by one percent effective February 1, 2011: Ambulance Services; Case Management for Pregnant Women; Early and Periodic Screening, Diagnosis and Treatment Services, including Medical Checkups, Private Duty Nursing, and Therapies in a Comprehensive Outpatient Rehabilitation Facility/Outpatient Rehabilitation Facility; but not including Personal Care Services; Family Planning Services; Home Health Services, including Professional Services and Durable Medical Equipment and Expendable Supplies; Mental Health Rehabilitation Services; Mental Health Targeted Case Management; Physicians and Certain Other Practitioners, including Dental Services, Anesthesia Services, Licensed Clinical Social Workers, Licensed Professional Counselors, Licensed Marriage and Family Therapists, and other practitioners; Tuberculosis Clinics; and the Vendor Drug Dispensing Fee, to include both the fixed and variable component of the fee.

Methodology and Justification. A one percent reimbursement reduction was previously implemented for services provided on and after September 1, 2010, in compliance with a plan approved in response to the January 15, 2010, letter from the Governor, Lieutenant Governor, and Speaker regarding the revision to the Spending Reduction Plan for the 2010-2011 Biennium submitted by HHSC. On December 6, 2010, the Governor, Lieutenant Governor, and House Speaker sent a letter to all State Agencies asking them to identify savings of 2.5 percent of their original general revenue and general-dedicated-appropriations for fiscal year 2011. In response to this letter and in accordance with 1 TAC §355.201, reimbursements are proposed to be reduced. For the Vendor Drug Dispensing Fee, which was reduced by one percent effective September 1, 2010, the fee effective February 1, 2011, will be an amount equal to the fee in effect on August 31, 2010, less two percent. For all the other listed services, for which the September 1, 2010, one percent reduction was implemented by reducing reimbursements in effect on August 31, 2010, by one percent, the proposed reimbursement for services provided on and after February 1, 2011, will be equal to the reimbursement indicated on the agency's current fee schedule in effect on August 31, 2010, less two percent. The proposed reimbursements are calculated in accordance with the previously cited sections of 1 TAC and the following sections, as applicable:

§355.743, which addresses the reimbursement methodology for Mental Health Case Management;

§355.781, which addresses the reimbursement methodology for Mental Health Rehabilitative Services;

§355.8001, which addresses the reimbursement methodology for vision care services;

§355.8021, which addresses the reimbursement methodology for home health professional services and durable medical equipment, prostheses, orthotics and supplies;

§355.8081, which addresses the reimbursement methodology for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, Psychologists' Services, and Licensed Psychological Associates' Services;

§355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners;

§355.8087, which addresses the reimbursement methodology for in-home total parenteral hyperalimentation services;

§355.8091, which addresses the reimbursement methodology for licensed professional counselors, licensed master social worker-advanced clinical practitioners, and licensed marriage and family therapists;

§355.8093, which addresses the reimbursement methodology for physician assistants;

§355.8141, which addresses the reimbursement methodology for hearing aid services;

§355.8161, which addresses the reimbursement methodology for certified nurse midwives;

§355.8221, which addresses the reimbursement methodology for certified registered nurse anesthetists;

§355.8241, which addresses the reimbursement methodology for chemical dependency and treatment facilities;

§355.8281, which addresses the reimbursement methodology for nurse practitioner or clinical nurse specialist;

§355.8401, which addresses the reimbursement methodology for case management for children and pregnant women;

§355.8441, which addresses the reimbursement methodology for durable medical equipment, prostheses, orthotics, and supplies in the early and periodic screening, diagnosis, and treatment;

§355.8441(4), which addresses the reimbursement methodology for Private Duty Nursing in EPSDT;

§355.8461, which addresses the reimbursement methodology for eyeglass program;

§355.8551, which addresses the reimbursement methodology for pharmacy services dispensing fee;

§§355.8581 - 355.8584, which address the reimbursement methodology for case management for family planning purchased services; and

§355.8600, which addresses the reimbursement methodology for ambulance services.

Briefing Package. A briefing package describing the proposed payments will be available at www.hhsc.state.tx.us/medicaid/programs/rad/ratepackets.html on or after December 17, 2010. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payments may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas

78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201007109
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective February 1, 2011.

On December 6, 2010, the Governor, Lieutenant Governor, and House Speaker sent a letter to all State Agencies asking them to identify savings for 2.5 percent of their original general revenue and general-dedicated-appropriations for fiscal year 2011. In response to this letter and in accordance with Title 1 of the Texas Administrative Code §355.201(d), Medicaid provider reimbursements are proposed to be reduced by one percent. These amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan for these for the following:

Clinical Laboratory Services

Freestanding Psychiatric Facilities

Ambulatory Surgical Centers

Hospital Outpatient Medicaid Services

Renal Dialysis Facilities

Inpatient Hospitals

The proposed amendments are estimated to result in an additional annual aggregate savings of $31,822,609 for the remainder of federal fiscal year (FFY) 2011, with approximately $20,547,859 in federal funds and $11,274,750 in State General Revenue (GR). For FFY 2012, the estimated additional aggregate savings is $50,535,894, with approximately $29,421,997 in federal funds and $21,113,897 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Kevin Nolting, Director of Rate Analysis for Hospital Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1348; by facsimile at (512) 491-1998; or by e-mail at kevin.nolting@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201007083
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective February 1, 2011.

On December 6, 2010, the Governor, Lieutenant Governor, and House Speaker sent a letter to all State Agencies asking them to identify savings of 2.5 percent of their original general revenue and general-dedicated-appropriations for fiscal year 2011. In response to this letter and in accordance with Title 1 of the Texas Administrative Code §355.201(d), Medicaid provider reimbursements are proposed to be reduced by one percent. These amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan for the following:

Ambulance Services

Case Management for Pregnant Women

Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services, including Medical Checkups, Private Duty Nursing, and Therapies in a Comprehensive Outpatient Rehabilitation Facility / Outpatient Rehabilitation Facility; but not including Personal Care Services

Family Planning Services

Home Health Services, including Professional Services and Durable Medical Equipment and Expendable Supplies

Mental Health Rehabilitation Services

Mental Health Targeted Case Management

Physicians and Certain Other Practitioners, including Dental Services, Anesthesia Services, Licensed Clinical Social Workers, Licensed Professional Counselors, Licensed Marriage and Family Therapists, and other practioners

Tuberculosis Clinics

Vendor Drug Dispensing Fee, to include both the fixed and variable component of the fee

The proposed amendments are estimated to result in an additional annual aggregate savings of $50,206,203 for the remainder of federal fiscal year (FFY) 2011, with approximately $33,367,043 in federal funds and $16,839,160 in State General Revenue (GR). For FFY 2012, the estimated additional aggregate savings is $53,153,307, with approximately $30,944,109 in federal funds and $22,207,452 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201007084
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The Legislative Budget Board and the Governor's Office informed HHSC in a letter dated May 17, 2010, of their revision to the Spending Reduction Plan for the 2010-11 Biennium submitted by HHSC. The spending reduction plan was submitted in response to a letter dated January 15, 2010, from the Governor, Lieutenant Governor, and Speaker requesting a spending reduction proposal. As a result of the spending reduction plan, this amendment will update the Medicaid state plan regarding the reimbursement methodology for federal qualified health clinics (FQHC) under the Alternative Prospective Payment System (APPS). The amendment will reduce the add-on percentage to the Medicare Economic Index (MEI) from 1.5 percent to 0.5 percent. The update also adds language instructing the providers to reselect their reimbursement methodology once a change to the methodology has been made. The proposed amendment is effective January 1, 2011.

The proposed amendment is estimated to result in a savings of $807,099 for federal fiscal year (FFY) 2011, consisting of $524,372 in federal funds and $282,727 in state general revenue. For FFY 2012, the savings is $1,104,111 consisting of $642,814 in federal funds and $461,298 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Andrew Wolfe, Hospital Reimbursement, by mail Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1371; by facsimile at (512) 491-1998; or by e-mail at andrew.wolfe@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201007085
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective February 1, 2011.

The amendments will modify the reimbursement methodologies in the State Plan for Nursing Facilities (NF) and non-state operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR). These changes are being made in response to a letter sent to all State Agencies by the Governor, Lieutenant Governor and House Speaker on December 6, 2010, asking them to identify savings of 2.5 percent of their original general revenue and general-revenue-dedicated appropriations for fiscal year 2011. In response to this letter, and in accordance with Title 1 of the Texas Administrative Code section 355.201(d), the payment rates for NFs and non-state operated ICFs/MR are proposed to be reduced by an additional two percent below the rates that were in effect August 31, 2010. This proposed reduction is in addition to the one percent reduction to the August 31, 2010, rates that became effective September 1, 2010. The combined impact of these two reductions will be that rates proposed to be effective February 1, 2011, will be three percent less than rates in effect on August 31, 2010.

The NF reimbursement methodology will be modified to indicate that, effective February 1, 2011, for each Resource Utilization Group and supplemental reimbursement group, each rate component will be equal to the rate component in effect on August 31, 2010, less three percent.

The non-state operated ICF/MR reimbursement methodology will be modified to indicate that, effective February 1, 2011, payment rates will be equal to the rates in effect on August 31, 2010, less three percent.

The proposed amendments are estimated to result in annual aggregate savings of $41,915,619 for the remainder of federal fiscal year (FFY) 2011, with approximately $27,857,121 in federal funds and $14,058,498 in State General Revenue (GR). For FFY 2012, the estimated aggregate savings is $62,873,428, with approximately $36,604,909 in federal funds and $26,268,519 in GR.

Interested parties may obtain copies of the proposed amendments by contacting Pam McDonald, Director of Rate Analysis for Long Term Services and Supports, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1373; by facsimile at (512) 491-1998; or by e-mail at pam.mcdonald@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201007090
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 14, 2010

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Department of State Health Services

Notice of Amendment to the Texas Schedules of Controlled Substances

This amendment was signed by the Commissioner of the Department of State Health Services on December 13, 2010, and will become effective twenty-one days following the date of this publication in the *Texas Register.*

The Deputy Administrator of the Drug Enforcement Administration (DEA) placed the substance 4-anilino-N-phenethyl-4-piperidine (ANPP) into Schedule II of the Schedules of Controlled Substances under the authority of the United States Controlled Substance Act (USCSA) effective August 30, 2010. This final rule was published in the *Federal Register,* Volume 75, Number 124, pages 37295 - 37299. The Deputy Administrator of the DEA has taken this action because the substance has been designated an "immediate precursor" for fentanyl; therefore, it may be placed into the same schedule as the controlled substance it produces.

Pursuant to §481.034(g), as amended by the 75th legislature, of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least thirty-one days have expired since notice of the above referenced action was published in the *Federal Register;* and David L. Lakey, M.D. in the capacity as Commissioner of the Department of State Health Services hereby orders that the substance 4-anilino-N-phenethyl-4-piperidine (ANPP) be added to Schedule II of the Texas Controlled Substances Act.

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis

No change.

Opiates

No change.

Schedule II stimulants

No change.

Schedule II depressants

No change.

Schedule II hallucinogenic substances

No change.

Schedule II precursors

Unless specifically excepted or listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances:

(1) Immediate precursor to methamphetamine:

(1-1) Phenylacetone and methylamine if possessed together with intent to manufacture methamphetamine;

(2) Immediate precursor to amphetamine and methamphetamine:

(2-1) Phenylacetone (some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone); and

(3) Immediate precursors to phencyclidine (PCP):

(3-1) 1-phenylcyclohexylamine; and

(3-2) 1-piperidinocyclohexanecarbonitrile (PCC).

(4)* Immediate precursor to fentanyl:

(4-1) 4-anilino-N-phenethyl-4-piperidine (ANPP).

Changes to the Schedules are designated by an asterisk (*)

TRD-201007111
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: December 15, 2010

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application to change the name of MAX AMERICA INSURANCE COMPANY to ALTERRA AMERICA INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201007033
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 13, 2010

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Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is seeking quotes for Customized Learning Materials Kits suitable for use in a regulated day-care setting. Kits will be designed to include materials suitable for children in age groups of 0-17 months, 18-35 months, 3-5 years and 6 years and older. All kits, at a minimum, must target the seven interest areas from the Texas Rising Star (TRS) Provider Certification guidelines of blocks, dramatic play, manipulatives, stories/language, music, art, and discovery/science.

This project is funded by an American Recovery and Reinvestment Act (ARRA) grant and intended to assist area child care providers in serving children in a quality setting. To that end, selected providers in the area will be awarded kits as described above. A copy of the Request for Quotes (RFQ) can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 West Eighth Avenue, Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator at (806) 372-3381 or lhardin@theprpc.org. Proposals must be received at PRPC by 3:00 p.m. on Friday, January 7, 2011.

TRD-201007002
Leslie Hardin
Facilities, Training and Support Coordinator
Panhandle Regional Planning Commission
Filed: December 10, 2010

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Power Line Easement

Brazoria County

Justin Hurst Wildlife Management Area

In a meeting on January 27, 2011, the Texas Parks and Wildlife Commission (the Commission) will consider the granting of an easement for an aerial electrical line 1142' long and a cathodic pipeline protection station on the Justin Hurst Wildlife Management Area in Brazoria County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Transmission Line Easement

Briscoe County

Caprock Canyon Trailway

In a meeting on January 27, 2011, the Texas Parks and Wildlife Commission (the Commission) will consider the granting of an easement for a Competitive Renewable Energy Zones (CREZ)-related aerial electrical transmission line across the Caprock Canyon Trailway in Briscoe County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Land Disposition

Harrison County

Communications Installation

In a meeting on January 27, 2011, the Texas Parks and Wildlife Commission (the Commission) will consider the transfer of a 2-acre tract of land to Harrison County for public purposes. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Land Donation

Bandera and Kendall County

3K Ranch

In a meeting on January 27, 2011, the Texas Parks and Wildlife Commission (the Commission) will consider accepting a donation of approximately 3796-acres of land known as the 3K Ranch located 7 miles west of Boerne, Texas along State Highway 46 in Bandera and Kendall County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-201007124
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 15, 2010

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State Preservation Board

Consulting Services Contract Notification

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, the State Preservation Board is giving notice that it intends to award a consulting agreement for a museum comprehensive strategic plan to Draper Consulting Group, unless a better offer is received. The strategic plan will assess the museum's current operating environment to create a road map for its next five years of growth and development. The museum's new strategic plan will be designed to ensure future economic viability through educational programming, exhibitions, and fund development.

Please call Joan Marshall, Museum Director, The Bob Bullock Texas State History Museum, (512) 463-0169, if you have questions or need further information. The deadline for inquiries January 24, 2011.

TRD-201007110
Linda Gaby
Director of Administration
State Preservation Board
Filed: December 15, 2010

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2010, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Television, Inc. to Amend its State-Issued Certificate of Franchise Authority, Project Number 38962.

The requested amendment is to expand the service area footprint to include the municipal boundaries of the City of Cottonwood Shores, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38962.

TRD-201007005
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2010, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority, Project Number 38963.

The requested amendment is to expand the service area footprint to include the municipalities of Plano and Richardson, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38963.

TRD-201007006
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 10, 2010, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of XIT Communications to Amend its State-Issued Certificate of Franchise Authority, Project Number 38969.

The requested amendment is to expand the service area footprint to include city of Texline, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38969.

TRD-201007101
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 10, 2010, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, LLC d/b/a Charter Communications to Amend its State-Issued Certificate of Franchise Authority, Project Number 38970.

The requested amendment is to expand the service area footprint to include city of Denton, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38970.

TRD-201007102
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on December 9, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in Wheeler County, Texas.

Docket Style and Number: Application of Golden Spread Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line within Wheeler County. Docket Number 38943.

The Application: The application of Golden Spread Electric Cooperative, Inc. (Golden Spread) for a proposed 115-kV transmission line in Wheeler County, Texas is designated as the Howard - Ft. Elliott 115-kV Transmission Line Project. The proposed project will be constructed on single circuit single wood pole structures and will be approximately 12.5 miles in length. The estimated cost of the project is $7,000,000. The estimated date to energize facilities is June 1, 2011.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is January 23, 2011. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38943.

TRD-201007007
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2010

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On December 9, 2010, Global Crossing Telemanagement, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60149. Applicant intends to relinquish the certificate.

The Application: Application of Global Crossing Telemanagement, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 38965.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 31, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38965.

TRD-201007024
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2010

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing on December 10, 2010, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on December 20, 2010.

Docket Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas for Approval of LRIC Study for 5-1-1 Service Pursuant to P.U.C. Substantive Rule §26.215, Docket Number 38966.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 38966. Written comments or recommendations should be filed no later than 45 days

after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 38966.

TRD-201007100
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 2010

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Public Notice of Workshop on NIST Guidelines for Smart Grid Cyber Security

The Public Utility Commission of Texas (commission) will host a workshop from 9:00 a.m. until 5:00 p.m. on Wednesday, February 23, 2011, in Room 206 at ERCOT Austin, 7620 Metro Center Drive, Austin, Texas 78744. The workshop is a briefing of the NIST Interagency Report (NISTIR) 7628, which will be presented by NIST's Smart Grid Cyber Security Working Group (CSWG) Outreach Team. This proceeding is a continuation of Project Number 37944.

Items to be discussed include: An overview of the NIST Smart Grid Interoperability Panel (SGIP); Department of Energy (DOE) Threat Briefing; an overview of CSWG and its subgroups; Security Architecture; High Level Security Requirements; Cryptography and Key Management; Vulnerability Classes; Bottom-Up Security Analysis; Research and Development; Standards Review; Smart Grid Privacy.

This notice is not a notice of proposed rulemaking; however, the information discussed during the workshop may assist the commission in developing a commission policy or determining the necessity for a related rulemaking. Funding for this workshop was obtained from an American Reinvestment and Recovery Act (ARRA) grant received by the State Energy Conservation Office from the DOE.

Questions concerning the workshop or this notice should be referred to Alan Rivaldo, Infrastructure and Reliability Division, (512) 936-7162. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201007103
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 2010

♦ ♦ ♦

Request for Comments on Revised Quarterly Wholesale Electricity Transaction Report

The Public Utility Commission of Texas (commission) requests comments regarding revisions to its Quarterly Wholesale Electricity Transaction Report (QWETR) form. Project Number 35444, *Review of Quarterly Wholesale Electricity Transaction Report,* has been established for this proceeding.

The QWETR was originally designed to capture wholesale bilateral transactions in the Electric Reliability Council of Texas (ERCOT) zonal market. The commission proposes to update the QWETR to conform the report to the new nodal market. First, the commission proposes to update the Point of Delivery (POD) and Point of Receipt (POR) fields to reflect the PODs and PORs in nodal, which are resource nodes, load zones, and hubs. Second, the commission proposes to add transaction product types available in the nodal market to the Product field. The revised form can be found on the commission's Interchange (http://www.puc.state.tx.us/interchange/index.cfm) under Project Number 35444.

Comments may be filed by submitting 16 copies to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. Initial comments may be submitted by January 14, 2011 (21 days after publication) and reply comments may be submitted by January 18, 2011 (25 days after publication). All comments should reference Project Number 35444.

Questions concerning Project Number 35444 should be referred to Tony Grasso, Competitive Markets Division, at (512) 936-7385 or Patrick Peters, Legal Division, at (512) 936-7232. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201006980
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2010

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Supreme Court of Texas

Amendments to Texas Rules of Civil Procedure 281 and 284 and to the Jury Instructions Under Texas Rule of Civil Procedure 226A

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 10-9210

AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE 281 AND 284 AND TO THE JURY INSTRUCTIONS UNDER TEXAS RULE OF CIVIL PROCEDURE 226A

ORDERED that:

1. Pursuant to Section 22.004 of the Texas Government Code, the Supreme Court of Texas amends Texas Rules of Civil Procedure 281 and 284, as follows.

2. The Supreme Court of Texas also amends the jury instructions that are prescribed by Order of this Court under Texas Rule of Civil Procedure 226a, as follows.

3. Rules 281 and 284 and the Rule 226a instructions, with any modifications made after public comments are received, take effect April 1, 2011. Comments regarding this Order may be submitted to the Supreme Court of Texas in writing on or before March 4, 2011. Comments should be directed to Kennon L. Peterson, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or kennon.peterson@txcourts.gov.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register.*

Dated: December 13, 2010.

_____

Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

_____

Debra H. Lehrmann, Justice

Rule 281. Papers Taken to Jury Room

With the court's permission, T~~t~~he jury may take with them to the jury room any notes they took during the trial. In addition, the jury may, and on request shall, take with them in their retirement the charges and instructions, general or special, which were given and read to them, and any written evidence, except the depositions of witnesses, but shall not take with them any special charges which have been refused. Where only part ~~only~~ of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded.

* * * *

Rule 284. Judge to Caution Jury

Immediately after jurors are selected for a case, the court must instruct them to turn off their cell phones and other electronic devices and not to communicate with anyone through any electronic device while they are in the courtroom or while they are deliberating. The court must also instruct them that, while they are serving as jurors, they must not post any information about the case on the Internet or search for any information outside of the courtroom, including on the Internet, to try to learn more about the case.

If jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them, the ~~jury shall be admonished by the~~ court must instruct them that it is their duty not to communicate ~~converse~~ with, or permit themselves to be addressed by, any other person~~, on~~ about any subject ~~connected with~~ relating to the ~~trial~~ case.

* * * *

Jury Instructions Prescribed by Order Under Rule 226a

[proposed amendments are not redlined; brackets indicate optional and instructive text]

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn in as provided in Rule 226 and before the voir dire examination:

Members of the Jury Panel [or Ladies and Gentlemen of the Jury Panel]:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all cell phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions:

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury immediately after the jurors are selected for the case:

Members of the Jury [or Ladies and Gentlemen]:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all cell phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not talk about the case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example:

a. Do not try to get information about the case, lawyers, witnesses, or issues from outside this courtroom.

b. Do not go to places mentioned in the case to inspect the places.

c. Do not inspect items mentioned in this case unless they are presented as evidence in court.

d. Do not look anything up in a law book, dictionary, or public record to try to learn more about the case.

e. Do not look anything up on the Internet to try to learn more about the case.

f. And do not let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

III.

Court's Charge

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your cell phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not presented in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

a. Have the complete charge read aloud if it will be helpful to your deliberations.

b. Preside over your deliberations. This means the presiding juror will manage the discussions, and see that you follow these instructions.

c. Give written questions or comments to the bailiff who will give them to the judge.

d. Write down the answers you agree on.

e. Get the signatures for the verdict certificate.

f. Notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.

2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [Added if the charge requires some unanimity] There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all 12 [6] of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____

Judge Presiding

Verdict Certificate

Check one:

___ Our verdict is unanimous. All 12 [6] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

_____

Signature of Presiding Juror

_____

Printed Name of Presiding Juror

___ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

___ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE / NAME PRINTED

1. _____ _____

2. _____ _____

3. _____ _____

4. _____ _____

5. _____ _____

6. _____ _____

7. _____ _____

8. _____ _____

9. _____ _____

10. _____ _____

11. _____ _____

If you have answered Question No. ___ [the exemplary damages amount], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____

Signature of Presiding Juror

_____

Printed Name of Presiding Juror

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are released from jury duty:

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

TRD-201007098
Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: December 14, 2010

♦ ♦ ♦

The Texas A&M University System

Award of a Major Consulting Contract

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas A&M University System has entered into a consulting contract for wildlife hazard assessment consulting services. The consultant will provide assessment services at Texas A&M University Easterwood Airport.

The notice of request for proposals (RFP01 FPC-10-010) was published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 5123).

The Name and Address of the consultant is follows: Birdstrike Control Program, 16051 E FM 1097, Willis, Texas 77378-4077.

The A&M System will pay an amount of $32,162.00 to this consultant. The contract will begin December 7, 2010 and shall terminate no later than December 6, 2011.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to TAMUS, no later than one year after completion of services.

Any questions regarding this posting should be directed to: Don Barwick, HUB and Procurement Manager, Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Suite 1273, College Station, Texas 77845, voice: (979) 458-6410, e-mail: dbarwick@tamu.edu.

TRD-201007082

Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: December 14, 2010

♦ ♦ ♦

Texas State University-San Marcos

Notice of Request for Proposals to Provide Consultant Services

This notice states the intent of Texas State University-San Marcos (Texas State), pursuant to the provisions of Texas Government Code, Chapter 2254, Subchapter B, to solicit proposals to enter into a consulting services contract related to preparing a comprehensive campus housing study and master plan. Proposals are due at Texas State at the location specified in the RFP on or before 3:00 p.m. Central Standard Time on Wednesday January 26, 2011. Texas State will not accept late proposals. Proposals received after the submittal deadline will not be considered.

To respond, interested parties/consultants/consulting firms must contact the designated Texas State authorized representative in writing, as indicated below, to request a solicitation package in order to submit the information requested in this RFP, along with any other relevant information, in a clear and concise written format.

For further information, or to request an RFP package, please contact Dr. Rosanne Proite via e-mail at rp43@txstate.edu.

The Department of Housing and Residential Life ("DHRL" or "Department") at Texas State University-San Marcos ("Texas State" or "University") is seeking responses (Proposals) to this solicitation from qualified individuals or firms ("Respondents") to perform the services ("Work") described below:

Comprehensive Campus Housing Study and Master Plan: A comprehensive study of the Texas State campus housing system is deemed necessary and immediate to provide direction to the University for student residential living for the next 10 to 15 years. The housing system's value as an asset, both financially and programmatically, is in need of a significant and detailed review with recommendations as to how best to proceed with future capital investment.

Objectives: Texas State needs assistance in formulating a Student Housing and Residential Life master plan study and resultant plan that will identify and validate projects for demolition, renovation, redevelopment, and new construction for on-campus housing for the next 10 to 15 years. Situated as a priority within revision work for the total campus master plan study, the nature and timing of any new construction of residential housing or renovation of existing facilities needs to be identified, documented, and result in recommended direction for the University. Such a plan should reflect sufficient flexibility to permit Texas State to consider alternatives, funding, impact of various projects on current and future operations, changing market conditions, and phasing options for project completion.

Texas State is operating under a campus-wide master plan which was completed in 2006. Housing was not addressed to any significant extent in the overall campus master plan, so it is desired to now create a separate study, to complete a market and financial feasibility review of the Texas State Campus Housing System. The findings will be incorporated into campus master plan revisions, and will be used to make decisions concerning replacement, renovation, and new construction.

For information and reference purposes, a separate firm will be engaged to audit the physical condition of the existing structures and building envelope and determine the general condition of all residence halls and apartments. In addition, the physical audit services will specifically identify building component-related problems and cite both physical and code-driven deficiencies that may reveal themselves upon physical review and inspection of record documents. The facilities audit will focus on specific building assessment-related disciplines including Architectural, ADA, Structural, Mechanical, Electrical, and Plumbing Systems. The results of the facilities audit will be used in conjunction with the results of the campus housing study to determine priorities for moving forward with renovation of existing facilities and demolition of old facilities, coupled with new construction.

The award for the described consulting services, if made, will be based on "best value" criteria by the process indicated in the RFP. The University will base its choice on demonstrated competence, knowledge, and qualifications; and on the reasonableness of the proposed fee for the services.

A finding of fact, approved by the President of Texas State, for the need for these consultant services has been obtained.

TRD-201007112
Robert C. Moerke
Director of Contract Compliance
Texas State University-San Marcos
Filed: December 15, 2010

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*